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No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
Counsel of Record

Seven Winthrop Street
Essex, MA 01929
(978)768-6610

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

1. Has the court of appeals nullified the core principles of Chambers v. NASCO, Inc., 501 U.S. 32(1991) and sabotaged the "safe harbor" provisions of the federal rules when it sua sponte relied upon a bankruptcy court's inherent power to justify sanctioning an attorney who had withdrawn the offending motion before sanctions were imposed?

2. Is an attorney against whom sanctions are imposed for filing an allegedly frivolous motion denied due process when she is deprived of the "safe harbor" opportunity provided by bankruptcy and federal rules to withdraw or correct the offending motion before sanctions could be imposed?

3. There is a split of authority among the circuits on the propriety of resorting to a court's inherent power instead of the relevant federal rules and statutes to impose sanctions in the aftermath of an allegedly frivolous filing; does this conflict warrant resolution by this Court which has the responsibility in its superintendency over the federal system to formulate the controlling rules for litigation so that these rules in their reach and result provide all parties with due process?

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The published Memorandum Order of the United States Bankruptcy Court for the Southern District of Florida in In re: James F. Walker, Debtor, Civil Action No. 03-32158-BKC-PGH Chapter 7, filed April 26, 2006, sanctioning the petitioner in the amount of $14,000, is set forth in the Appendix hereto(App.12-69).

The unpublished order of the Court of Appeals for the Eleventh Circuit in Mary Alice Gwynn v. James F. Walker(C.A. No. 07-14049), dated August 28, 2008, denying the petitioner's timely filed petition for rehearing or for rehearing en banc, is set forth in the Appendix hereto(App. 70).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the order of the United States Bankruptcy Court for the Southern District of Florida sanctioning the petitioner in the amount of $14,000 was entered on July 7, 2008; and its further order denying the petitioner's timely filed petition for rehearing or for rehearing en banc, was filed on August 28, 2008(App.1;70).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing or for rehearing en banc. 28 U.S.C. 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. 1927

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

11 U.S.C. 105

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking

any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

Fed. R. Civ. P. 11(c)

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation....

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial, is

withdrawn or appropriately corrected within 21 days after service or within another time the court sets....

Fed. Bankruptcy Rule 9011:9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signing of papers

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless

increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative

On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

STATEMENT

In the wake of certain misconduct by Gary J. Rotella, Esq.("Rotella"), the attorney for the respondent debtor James F. Walker ("the respondent" or "Walker"), and his serial motions for sanctions against her, the petitioner Mary Alice Gwynn, Esq.

("the petitioner"), an attorney for one of the two judgment creditors of the respondent, filed on April 5, 2004, the alleged offending motion seeking sanctions against Rotella(App. 2;14;33-34).

On May 28, 2004, six weeks later, without any prior notice of Rotella's intent to seek sanctions against her under Bankruptcy Rule 9011, the petitioner orally withdrew the alleged offending motion with the approval of Rotella and the Bankruptcy Court during a scheduled hearing on various other motions. The oral withdrawal by the petitioner was followed with a confirming court order, drafted by Rotella, one which contained no notice of any reservation of right or jurisdiction for Rotella to seek or for the Bankruptcy Court to impose Rule 9011 sanctions against the petitioner based upon this offending motion(App. 20).

On June 7, 2004, approximately a week later, the petitioner withdrew as counsel for the creditor and a motion for substitution of counsel was filed(App. 14). The motion was granted on June 9, 2004(App. 14). The order by the Bankruptcy Judge granting the substitution of counsel did not reserve jurisdiction to consider any future matter involving the petitioner and she was relieved from the proceeding(App. 14).

On July 7, 2004, after the petitioner was no longer in the case, and without prior notice, Rotella filed a motion seeking Rule 9011 sanctions against the petitioner "for her having filed...on April 5, 2004, [her] motion for sanctions against" Rotella, alleging for the first time, after the petitioner had already withdrawn this offending motion, that it lacked merit and factual support and therefore justified the award Rule 9011

sanctions(App. 19-20).

Despite the entry of the order withdrawing the petitioner's offending motion and even though the petitioner had been released from this case as counsel for one of the creditors, Rotella's motion seeking Rule 9011 sanctions against her for filing this earlier motion was set down for hearing in Bankruptcy Court on April 21, 2005(App. 20). At this hearing, Rotella conceded that he had not sent the required 21-day Safe Harbor communication to the petitioner for this motion; the court thereupon denied Rotella's motion for sanctions "without prejudice to it being re-filed under any other appropriate grounds"(App. 20).

The Bankruptcy Judge then allowed Rotella to re-file his failed Rule 9011 motion for sanctions under 28 U.S.C. 1927, again without any prior notice as the subject motion had been withdrawn without objection by Rotella or reservation by the Bankruptcy Judge some twelve (12) months earlier(App. 21). On July 15, 2005, the Bankruptcy Court denied the petitioner's motion to dismiss Rotella's renewed motion for sanctions under 28 U.S.C. 1927, for lack of jurisdiction and for lack of notice; and on August 29, 2005, after hearing, it issued an order granting sanctions against the petitioner under 28 U.S.C. 1927, and 11 U.S.C. 105(App. 21-22).

On October 7, 2005, the Bankruptcy Court sua sponte issued an amended order vacating its August 29, 2005, order granting the sanctions under 28 U.S.C. 1927, and issued an amended order granting the sanctions but reserving judgment on the amount of the award(App. 22). The amended order found that the

petitioner had been negligent in conducting routine investigations before lodging unfounded and inconsistent allegations against Rotella, an implicit finding that the petitioner had not acted in bad faith or with ill will(A.22). As the Bankruptcy Judge observed, if the petitioner had researched the issue a little better, she would not have filed the pleadings that she did(A.22). He found that her offending motion, long since withdrawn, was vexatious, frivolous and an abuse of process which unreasonably multiplied the proceedings in violation of 28 U.S.C. 1927, and 11 U.S.C. 105(App. 22-23).

On April 26, 2006, the Bankruptcy Court then entered a third order once again awarding Rotella sanctions under 28 U.S.C. 1927(App. 12-69). In that order, the Bankruptcy Court without notice and without taking any additional evidence, sua sponte changed its analysis justifying the sanction from one of negligence/carelessness by the petitioner reflected in its previous orders of August 29, 2005, and October 7, 2005, to a more blameworthy standard of "bad faith"(App. 44-46;48-49). Because she was given no notice that the Bankruptcy Judge was contemplating a new order containing a new rationale for sanctioning her other than the episodic negligence predicates associated with 28 U.S.C. 1927, the petitioner was deprived of an opportunity to refute the Court's new sua sponte finding of her "bad faith." Monetary sanctions in the amount of $14,000 were assessed against her(App. 49-54).

After the District Judge affirmed the sanction employing the same analysis as the Bankruptcy Judge under 28 U.S.C. 1927, the court of appeals affirmed the

sanction award against the petitioner(App. 1-11). However, in making this ruling, the court of appeals founded its decision not on any analysis under 28 U.S.C. 1927, but rather on its determination for the first time in this litigation---that the sanction award was a justifiable use of the Bankruptcy Court's "inherent power to impose sanctions on parties and lawyers"(App. 6-7). In this regard, the court further determined that the petitioner's conduct, i.e., the lack of any evidentiary support for her allegations together with her minimal investigation, now amounted to bad faith conduct invoking the lower court's inherent power(App. 7-8).

Finally, the court of appeals inexplicably overlooked the petitioner's clear challenge in her appellate argument to the procedural unfairness of determining her bad faith conduct in the absence of any hearing or opportunity to refute that elevated finding of bad faith and to conclude without further analysis that "Gwynn does not contend that she did not receive due process in the imposition of sanctions"(App. 7).

In the wake of this decision, the petitioner Gwynn petitioned the court of appeals for a rehearing or for a rehearing en banc of her claims. She argued that the court of appeals failed to address her appellate argument that the Bankruptcy Judge erred by imposing sanctions under 28 U.S.C. 1927; that the court of appeals erroneously ignored her appellate argument that the procedural scenario below denied her due process; and that its surprising and unanticipated reliance on the lower court's "inherent power" to justify the sanction "is in conflict with all Circuit Court cases the panel relies upon and adopted in support of its denial of sanctions under Rule 11."

On August 28, 2008, the court of appeals denied the petitioners' petition for rehearing or for rehearing en banc(App. 70). The petitioner now petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION

1. By Sua Sponte Affirming the Sanction Imposed Below By Resort To The Bankruptcy Court's Inherent Power Instead of Under 28 U.S.C. 1927, the Court of Appeals Nullified The Core Principles of Chambers v. NASCO, Inc., 501 U.S. 32(1991) And Sabotaged the Safe Harbor Provisions of Fed. R. Civ. P. 11.

In Chambers v. NASCO, Inc., 501 U.S. 32, 35(1991), this Court granted certiorari to "explore the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct."Id. Specifically, this Court addressed the question of whether the inherent power of the lower federal courts had been displaced through the promulgation of Fed. R. Civ. P. 11 and the enactment of 28 U.S.C. 1927. The lower courts had determined that the exercise of a court's inherent power was proper "when the party's conduct is not within the reach of the rule or the statute" Id. at 42.

In affirming the lower courts' continued recognition of the inherent power doctrine, the Chambers Court explained:

> [t]here is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion

> that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct.
>
> This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see Roadway Express, Inc. v. Piper, [447 U.S. 752, 767(1980)]. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50(emphasis supplied).

The misconduct by the litigant in Chambers was pervasive and encompassed different types of activities that for various reasons could not be sanctioned by either Rule 11 or 1927. However, when the misconduct at issue is of the type that is covered in its entirety by the rules or by the statute, should a court be permitted to ignore the requirements of the rule and instead invoke its inherent power? In other contexts, this

Court has explicitly prohibited an exercise of a court's inherent power if that power violated the intent of an otherwise applicable rule or statute. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 254(1988) (holding supervisory power may not circumvent mandatory language of harmless-error inquiry required by Fed. R. Crim. P. 52(a)); Carlisle v. United States, 517 U.S. 416, 428; 430(1996)(explaining that "inherent authority" to grant a motion for judgment of acquittal when motion was untimely under applicable rule was improper exercise of inherent authority); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35(1998)(ruling that mandatory language of a procedural rule is "impervious to judicial discretion").

The amorphous guidelines set forth in Chambers, i.e., the court's inherent power is proper when the rules are "not up for the task" or that "the inherent powers must continue to exist to fill in the interstices," id. at 46, unfortunately have resulted in an improper of expansion of resort by federal courts to their inherent powers to sanction parties or their attorneys. Since Chambers, the circuit courts of appeals have developed starkly different standards regarding the circumstances which should prompt a court to exercise its inherent power to sanction litigants when there exists otherwise applicable statutes or rules for those sanctions. This Court should grant certiorari to define the proper contours of the use of these inherent powers, the dimensions of which were left open by Chambers's indefinite guidelines, uncertain standards which have resulted in the circuit conflict detailed below. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393(1923); Rice v. Sioux City Cemetery, 349 U.S. 70, 79(1955).

The material facts are not in dispute. During bankruptcy proceedings, the petitioner filed a motion for sanctions against opposing counsel. A hearing was set on numerous other matters between the petitioner and the respondent, including the sanction motion. On the morning of the hearing, the petitioner on her own initiative withdrew the motion for sanctions without objection. Several weeks later, for health reasons, the petitioner withdrew from the case, again without objection and without any conditions imposed by the court. The respondent thereafter filed a motion for Rule 11 sanctions based solely on a challenge to the previously agreed upon withdrawn motion for sanctions. Ultimately, the respondent's unnoticed Rule 11 sanction motion was denied because the respondent had not complied with Rule 11's Safe Harbor provisions.

However, the Bankruptcy Court invited the respondent to seek sanctions under any other authority he so chose. The respondent complied and the Bankruptcy Court ultimately imposed sanctions on the petitioner pursuant to both 28 U.S.C. 1927 and 11 U.S.C. 105. In doing so, the court, without conducting any further hearing or relying upon any different facts, altered its original finding of negligence and found now that the petitioner had acted in bad faith. On appeal from the district judge's affirmance of this sanction, the petitioner argued that the district court had erred in imposing sanctions upon her under 28 U.S.C. 1927, and in substituting a finding of bad faith for a finding of negligence without providing her a hearing on this crucial issue. The court of appeals affirmed the sanction award by side-stepping altogether the issue of whether 1927 was satisfied on this record and by sua sponte

ruling that "[f]ederal courts, including bankruptcy courts, have the inherent power to impose sanctions on parties and lawyers"(App. 7).

By affirming the actions of the Bankruptcy Court by resort to its inherent power to impose sanctions on those who appear before it when there are federal statues and rules which rightly apply in the circumstances, the court of appeals has improperly expanded a federal court's inherent powers to sanction beyond the dimensions described by this Court in Chambers. Indeed, the result below nullifies the core principles of Chambers , is at odds with this Court's other decisions in Bank of Nova Scotia, Carlisle, and Lexecon Inc., and sabotages the Safe Harbor provisions of Rule 11, a prophylactic device insuring fairness which allows litigants and attorneys the opportunity to avoid sanctions by withdrawing the offending pleading/motion before the hearing on sanctions is held.

The 17-year policy established by Chambers is that resort to a court's inherent powers to justify sanctions should be used sparingly, only when the conduct sought to be sanctioned is not covered by any statute or rule, e.g., 1927 or Rule 11, or only when the presumptively applicable statute or rule is "not up to the task" to address the offending conduct.

The conduct raised by this petition is clearly distinguishable from the conduct addressed in Chambers, conduct which was otherwise punishable under Rule 11. This Court in Chambers agreed with the Fifth Circuit Court of Appeals that the federal district court acted appropriately when it invoked its inherent power to sanction bad-faith conduct, behavior

which was so egregious that it went beyond the rules and statutory schemes available to the district court. This Court held that by utilizing the discretion to invoke its inherent power to sanction Chambers, the district court acted in an acceptable manner " in light of the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure such abuses were not repeated," and further held that in utilizing its inherent power in order to punish Chambers' severe conduct, the district court did not "thwart the mandatory terms of Rule 11 ." 501 U.S. at 50.

In contrast, in the instant case, none of the offending conduct by the petitioner rose to a level which would warrant a bad-faith finding, certainly not to a level which would invoke the Court's inherent power under the calculus in Chambers. There the offending litigant was sanctioned " for the fraud he perpetuated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of litigation," id. at 54; and he had received ample notice that his conduct was sanctionable. The petitioner here, on the other hand, with the respondent's agreement, voluntarily withdrew the offending motion before the Bankruptcy Court. None of these facts here reasonably comes within Chambers and the court of appeals was wrong to resort to the lower court's inherent powers to justify the sanction of $14,000 levied against the petitioner.

By wrongly invoking the lower court's inherent power for the first time at the appellate level as a "fail safe" when the offending conduct was clearly covered under the federal rules and statutes law which would

have prevented the sanctions from being imposed because the petitioner was not provided with the Safe Harbor opportunity provided by this law the court of appeals has expanded Chambers beyond its reasonable contours, sabotaged the Safe Harbor provisions of the federal rules and undermined Chambers' 17-year policy that resort to a court's inherent powers to justify sanctions should be used sparingly, only when the conduct sought to be sanctioned is not covered by any statute or rule, e.g., 1927 or Rule 11, or only when the presumptively applicable statute or rule is "not up to the task" to address the offending conduct. Such was not the case here and the decision below violates these core principles of Chambers.

2. There is a Split of Authority Among the Circuits About When It Proper For a Federal Court to Resort To Its Inherent Powers In Order to Sanction A Party or An Attorney For Filing An Allegedly Frivolous Motion When Such Conduct Is Adequately Covered Under the Federal Rules.

The Seventh Circuit Court of Appeals in Corely v. Rosewood Care Center 142 F.3d 1041 (7th Cir. 1998), held that a lower court could not exercise is inherent power as a substitute for Rule 11 sanctions when a party failed to comply with the safe-harbor provisions of Rule 11. Id. at 1058.. The Corely Court interpreting Chambers and its previous case law explicitly found:

> Both this court and the Supreme Court have emphasized, moreover, that the inherent power must be invoked with the utmost caution, particularly where the matter under consideration "is governed by other procedural

> rules, lest . . . the restrictions in those rules become meaningless." Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 772-73 (7th Cir. 1997); see also Chambers, 501 U.S. at 44 & 50. That is a significant consideration here because defendants' suggestion that the sanction was an appropriate exercise of the court's inherent power, even if a technical violation of the procedural requirements of Rule 11, would have the effect of rendering Rule 11's separate motion and safe harbor provisions meaningless. As we have indicated in the past, "'where the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed.'" G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (quoting Landau & Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989)). Id. at 1059(emphasis added).

Both the Federal Circuit and the Third Circuit agree with Corely that a federal court should resort to its inherent power to sanction a party or attorney only sparingly and only when an otherwise applicable statute or rule is clearly not up to the task. See, e.g., see Amsted Industries, Inc. Buckeye Steel Castings Co. 23 F.3d 374 (Fed. Cir. 1994)(finding that courts abuse their discretion when they exercise their inherent power to sanction conduct that is covered by the rules); Montrose v. Med. Group Participating Sav. Plan v. Bulger , 243 F.3d 773(3rd Cir. 2001)(requiring courts to first apply rules of civil procedure prior to exercising inherent powers).

However, in First Bank of Marietta v. Hartford Underwriters Insurance, 307 F.3d 501, 510-511;515 n.12(6th Cir. 2002), the Sixth Circuit upheld the imposition of sanctions by resort to a court's inherent power even though there were applicable statutes and rules which could address the situation, basically eliminating the "up to the task " requirement of Chambers. Similarly, in United States v. Seltzer, 227 F.3d 36, 39(2nd Cir. 1999), the Second Circuit indicated that it too has an expansive reading of a court's inherent power to sanction beyond the limits set out in Chambers. Id. Both the Fifth Circuit and the Ninth Circuit agree that a lower court may resort to its inherent power to deal with episodic misbehavior falling short of bad faith even though there are states and federal rules available to address the problem. See, e.g., Carroll v. The Jaques Admiralty Law Firm, 110 F.3d 290(5th Cir. 1997); Fink v. Gomez, 239 F.3d 989,994(9th Cir. 2000); Mark Industries Ltd., v. Sea Captain's Choice, Inc., 50 F.3d 730, 732-733(9th Cir.1995).

This conflict among the circuits demonstrates that while this Court has explicitly precluded the exercise of a court's inherent power where other statutes and rules may address the situation, confusion and conflict exists. As explicitly found by the Seventh Circuit in Corely, a court's inherent powers cannot be used to circumvent the well established Safe Harbor provision of Rule 11. That would obviously and certainly eviscerate the intent of the Rule which explicitly addresses the misconduct of filing improper pleadings. This case presents the opportunity for this Court to address the obvious conflict among the circuits and this Court's precedent regarding the dimensions of

a court's inherent power that has been left open by Chambers.

Moreover, this inter-circuit conflict undermines the core principles of Chambers. The due process values which have prompted the Safe Harbor provisions of Rule 11 can easily be avoided by resort to a court's "inherent power" to mete out sanctions to parties or their attorneys. This unrestrained power to sanction also produces a "chilling effect" on the zealousness with which parties will bring controversial cases in the federal court. The growing tendency of some circuits to ignore Rule 11's Safe Harbor provisions and other relevant statutes in fashioning sanctions continues to undermine Chambers' core values and has led to a loss of procedural due process when sanctions are imposed.

3. The Procedure Below Sanctioning The Petitioner Violates Due Process.

The petitioner was denied procedural due process in three principal ways below:

1. She was denied the benefits of the Safe Harbor provisions of the federal rules when even though she had withdrawn the offending motion in a timely manner, she was still subjected without notice to sanctions for the same conduct even after having been allowed to withdraw from the bankruptcy proceeding altogether;

2. She was denied notice of, a hearing on and the right to argue against the finding of the Bankruptcy Judge that her negligent conduct had now been

transformed into bad faith which could be punished without a hearing and regardless of the Safe Harbor protections; and

3. She was denied the right to brief and argue before the court of appeals the question of whether the sanctions below could be justified on the basis of the lower court's inherent power. The court of appeals' unanticipated sua sponte resort to the lower court's inherent power to justify the sanction was never addressed, never raised by the parties and never briefed.

With regard to the first two asserted violations of due process, there can be no doubt that the Safe Harbor provisions of Rule 11 import into federal motion practice the notion of fundamental fairness, i.e., that a party or litigant should not be sanctioned if, upon reflection, she timely withdraws the offending motion before the sanctions hearing. To deny the petitioner this opportunity or to deprive her of the benefits which the Safe Harbor provisions make available to any litigant without notice and without a hearing is a denial of due process.

Employing the calculus of this Court's decision in Mathews v. Eldridge, 424 U.S. 319, 334-335(1976) to the circumstances of this case in order to balance the petitioner's legitimate private interest not to be sanctioned with monetary fines unfairly or to have her livelihood threatened with disciplinary action against the judicial system's need for efficient administration, the petitioner submits that the process due her below consisted of the following elements:

A. Adequate Notice. The petitioner was entitled to notice of the hearing on sanctions in the Bankruptcy Court which was reasonably calculated, under all the circumstances, to apprise her of the precise nature of this proceeding. Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314(1950). The notice was required to be of a kind which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with her objections in whatever form was allowed. Id. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1,13-14(1978).This was not provided for either the resuscitated sanction hearing or the Bankruptcy Judge's sua sponte finding made without any hearing at all or the taking of any evidence--- that the petitioner's conduct now amounted bad faith, not just episodic negligence.

B. A Full Evidentiary Hearing On Contested Fact Issues. There were fundamental fact questions to be determined by the Bankruptcy Judge before he could impose sanctions irrespective of the federal rules, e.g., did the petitioner's negligent failure to investigate her claims now amount to bad faith or ill will; or was the offending motion rather brought "unreasonably" or "vexatiously" and did the petitioner's conduct in this regard unduly "multiply the proceedings" within the meaning of 28 U.S.C. 1927? These questions invoked the adequacy of the factual investigation undertaken by the petitioner before she filed her offending motion for sanctions and a hearing addressing these contested fact questions bad faith or negligence?---- was required as a matter of due process before sanctions could be imposed on this record.

Moreover, considering the level of financial deprivation which would flow from the Bankruptcy Court's decision on sanctions and the low tolerance for the risk of a mistaken decision, see Morrissey v. Brewer, 408 U.S. 471, 485-489(1972), these fact questions could not be resolved by just oral argument or by requiring that the parties submit their respective positions "on the papers." Instead, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254,269-270(1970) citing ICC v. Louisville & N. R. Co., 227 U.S. 88,93-94(1913) and Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104 (1963). The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as whether the petitioner investigated her claims sufficiently before bringing her motion; whether she brought this motion in bad faith or unreasonably and vexatiously; whether she multiplied the proceedings; and whether there was an adequate explanation for the conduct deemed deficient.

Especially where the contested facts were subject to different interpretations by the parties and where the resulting decision would result in dramatic monetary penalties as well as possible exposure to professional discipline for the petitioner, she was entitled to a full evidentiary hearing so that the Bankruptcy Court would have a fair and complete record upon which to make its findings on each crucial fact issue while at the same time giving an appellate court a sufficient record upon which to review the

hearing judge's fact finding. See Goldberg v. Kelly, supra. Any doubt by the Bankruptcy Judge on this score should be resolved in favor of taking evidence. In this process, the parties' respective burdens of proof would be a preponderance of the evidence. Addington v. Texas, 441 U.S. 418, 423(1979). See also Hamdi v. Rumsfeld, 542 U.S. at 534.

C. A Fair And Impartial Tribunal. Due process requires a neutral and detached judge in the first instance. Hamdi v. Rumsfeld, 542 U.S. 507,533 (2004) quoting Ward v. Monroeville, 409 U.S. 57, 61-62(1972). Withrow v. Larkin, 421 U.S. 35, 46-47(1975). Goldberg v. Kelly, 397 U.S. at 271. In re Murchison, 349 U.S. 133, 136(1955). While the Bankruptcy Judge is more than a mere umpire----in fact, he is the governor of the proceedings before him he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly. Quercia v. United States, 289 U.S. 466, 470(1933). Nor "should [he] give vent to personal spleen or respond to a personal grievance." Offutt v. United States, 348 U.S. 11, 14(1954). See 28 U.S.C. Sections 455(a) and (b)(1).

The procedure below denied the petitioner all of these due process rights. She was sanctioned even though she had withdrawn the offending motion under the Safe Harbor provisions and long after she had withdrawn from these bankruptcy proceedings. She was sanctioned after a finding of bad faith, a finding made by the Bankruptcy Judge which recast her negligence to ill will after holding no hearing and taking no evidence. Moreover, she was sanctioned by a tribunal which had lost its ability to deliberate dispassionately about the issues before him. All of this

denied her due process.

As for the third asserted violation of due process, the court of appeals' sua sponte election to found its affirmance on the lower court's inherent power, a question never briefed or argued by the parties, the federal guaranty of due process, extends to the judicial branch of government and the way it decides a litigant's claims. Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1930). With any matter before it, this Court's

> present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether [they have] had an opportunity to present [their] case and be heard in its support... Whether acting through its judiciary or through its legislature, a [government] may not deprive a person of all existing remedies for the enforcement of a right...unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-682(Brandeis, J.)(footnotes omitted).

Thus where a state appellate court has interpreted its own State statute in a way that was unforeseen, "unexpected," or "indefensible by reference to the law which had been expressed prior to the conduct in issue," in order to deny the litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised this federal issue below. See, e.g., Bush v. Gore, 531 U.S. 98, 115(2000)(Rehnquist, C.J., concurring)(State

court's interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); Wright v. Georgia, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); N.A.A.C.P. v. Alabama, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). See also United States v. Lanier, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); Marks v. United States, 430 U.S. 188, 191-192(1977)(due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties).

Such is the case here. In sustaining the sanction imposed upon the petitioner below, the court of appeals has adopted an unforeseen and unexpected reading of the Chambers' rationale about the limited inherent right of courts to sanction an attorney when other statutes and rules apply---in fact, it has repealed that rationale entirely----so that the petitioner's good faith argument on appeal regarding 28 U.S.C. 1927 is completely disregarded. This unfair, unannounced and wrong reading of the Bankruptcy Court's power to sanction the petitioner never argued and never briefed on appeal----is "indefensible by reference to the law which had been expressed prior to the conduct in issue,"Bouie v. City of Columbia, 378 U.S. 347, 354(1964); and it is so far beyond a "fair reading" of Chambers as to constitute a denial of due process. Id. at 354-355.

While a government may set the terms on which it will permit litigation in its courts, Cohen v. Beneficial Loan Corp., 337 U.S. 541, 552(1949), it may not close its court house doors to litigants by denying them the opportunity to be heard on claims which this Court has already made clear are available to them upon proper proof. The court of appeals' repudiation of the principles enunciated by this Court in Chambers denies the petitioner due process and a fair hearing on her appellate claims.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit and, ultimately, to vacate the judgment sanctioning the petitioner; or to remand the matter to the District Court for a renewed evidentiary hearing consistent with due process before that court or another judge of the Bankruptcy Court on the respondent's motion for sanctions; or to provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,
Dennis P. Derrick
Seven Winthrop Street
Essex, MA 01929
(978)768-6610
Counsel of Record

(any footnotes trail end of each document)
No. 07-14049 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: JAMES F. WALKER, Debtor.
MARY ALICE GWYNN, Plaintiff-Appellant Cross-Appellee,
versus
JAMES F. WALKER, Defendant-Appellee Cross-Appellant.

July 7, 2008, Decided
July 7, 2008, Filed

Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 07-80121-CV-ASG. BKCY No. 03-32158-BKC-PGH.

JUDGES: Before DUBINA, BLACK and PRYOR, Circuit Judges.

OPINION

PER CURIAM:

Mary Alice Gwynn, counsel for a creditor in a bankruptcy proceeding, appeals pro se an award of sanctions against her, a denial of her motion for fees under Bankruptcy Rule 9011, and a denial of her motion for recusal. James F. Walker cross-appeals a separate order that vacated an award of sanctions against Gwynn. We affirm.

I. BACKGROUND

Most of the issues on appeal involve two motions for sanctions. Gary Rotella, counsel for Walker, filed both motions in response to motions filed by Gwynn that alleged misconduct by Rotella. In each instance, Rotella was not found to have engaged in misconduct.

Rotella filed the first motion after Gwynn filed a motion to disqualify Rotella as counsel for Walker. Rotella responded to the motion and moved to shorten the notice period for filing a motion for sanctions under Rule 9011. Rotella notified Gwynn that he would seek sanctions under Rule 9011 if she did not withdraw the motion to disqualify. After a hearing, the bankruptcy court denied both the motion to disqualify and the motion to shorten the notice period. Gwynn then filed a renewed motion to disqualify Rotella from representing Walker. That same day, Rotella filed a motion for sanctions against Gwynn under Rule 9011. Ten days later, the bankruptcy court denied the renewed motion to disqualify and granted the motion for sanctions.

Gwynn appealed the award of sanctions to the district court. The district court vacated the award of sanctions because Gwynn had not been afforded twenty-one days to withdraw her motion. Gwynn then filed a motion for attorney's fees and costs as the prevailing party under Rule 9011 and Bankruptcy Local Rule 8014-1. The bankruptcy court granted in part and denied in part the motion and taxed costs in the amount of $ 1,591.58 against Rotella, his law firm, and Walker.

Rotella filed the second motion in response to another motion filed by Gwynn. Gwynn had alleged that Rotella made false representations to the court, committed fraud against the court, and planned to benefit

personally at the expense of the creditors. The bankruptcy court granted Rotella's motion for sanctions and ordered Gwynn to pay Rotella $ 14,000.

II. STANDARDS OF REVIEW

We review the imposition of sanctions for abuse of discretion. *In re Mroz*, 65 F.3d 1567, 1571-72 (11th Cir. 1995). Under this standard, we "must affirm unless [we find] that the [lower] court has made a clear error of judgment, or has applied the wrong legal standard." *Amlong & Amlong, P.A. v. Denny's Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007). We may affirm on any legal ground supported by the record. *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). We also review a denial of a motion for recusal for abuse of discretion. *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000).

III. DISCUSSION

Our discussion is divided in four parts. First, we address Walker's argument that the district court should not have vacated the first sanction against Gwynn. Second, we address Gwynn's argument that the bankruptcy court abused its discretion in denying her request for fees and costs related to Gwynn's appeal of the first sanction and the denial of some of the expenses for which Gwynn sought reimbursement. Third, we address Gwynn's argument that the bankruptcy court abused its discretion in awarding a sanction of $ 14,000. Fourth, we address Gwynn's argument that the bankruptcy court erred when it denied Gwynn's motion for recusal.

A. The District Court Did Not Err When It Vacated the First Sanction Against Gwynn.

A party who moves for sanctions under Bankruptcy Rule 9011 must follow a two-step process. See Fed. R. Bankr. P. 9011(c)(1)(A). The party first must serve the motion on the opposing party and then, at least twenty-one days later, file the motion with the court. Id. This process provides a "safe harbor" in which the offending party can avoid sanctions by withdrawing or correcting the challenged document or position after receiving notice of the alleged violation.

Although this Circuit has never addressed whether a motion for sanctions under Rule 9011 may be filed after a court has ruled on the offending motion, the Second, Fourth, and Sixth Circuits have concluded that a motion under Federal Rule of Civil Procedure 11, which is "substantially identical" to Rule 9011, *Mroz*, 65 F.3d at 1572, cannot be filed "[i]f the court disposes of the offending contention before the twenty-one day 'safe harbor' period expires." *Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997); see also *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389-90 (4th Cir. 2004) (en banc); *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 & nn.1-2 (2d Cir. 2003). As the Sixth Circuit explained, "any other interpretation would defeat the rule's explicit requirements." *Ridder*, 109 F.3d at 295. Under that interpretation of Rule 9011, Walker's argument on cross-appeal fails.

There is no doubt that Rotella's motion for sanctions was filed after the offending motion had been denied. Gwynn filed the offending motion to disqualify Rotella

on April 21, 2004. Rotella gave notice that he would seek sanctions on April 24, 2004, but the bankruptcy court denied the motion to disqualify on April 28, 2004. On May 18, 2004, Gwynn filed a renewed motion to disqualify Rotella's law firm, and that same day Rotella filed a motion for sanctions under Rule 9011. Rotella's motion related to the first motion to disqualify filed by Gwynn. Although Rotella's motion for sanctions was filed more than twenty-one days after he gave notice that he would seek sanctions, the bankruptcy court had already denied Gwynn's first motion to disqualify.

We agree with the Second, Fourth, and Sixth Circuits that the service and filing of a motion for sanctions "must occur prior to final judgment or judicial rejection of the offending" motion. *Id.* at 297. Any argument to the contrary renders the safe harbor provision a mere formality. The provision cannot have any effect if the court has already denied the motion; it is too late for the offending party to withdraw the challenged contention. See id. The district court did not err when it vacated the award of sanctions.

B. The Bankruptcy Court Did Not Abuse Its Discretion in Its Denial of Fees, Costs, and Expenses for Gwynn.

Gwynn argues that the bankruptcy court abused its discretion when it did not award her attorney's fees and costs relating to her appeal of the award of sanctions. Gwynn also argues that the bankruptcy court abused its discretion when it did not award all of her reasonable expenses under Bankruptcy Rule 8014. We disagree.

Rotella's motion for sanctions and Gwynn's corresponding expenses could have been avoided if Gwynn had not filed her frivolous motion to disqualify Rotella in the first instance. One of the purposes of sanctions under Rule 9011 is to deter baseless filings, and courts should reduce an award of sanctions based on "the extent to which the nonviolating party's expenses could have been avoided, or mitigated." *Baker v. Alderman*, 158 F.3d 516, 528 (11th Cir. 1998). Because Gwynn's initial frivolous filing prompted the dispute, the bankruptcy court did not abuse its discretion when it denied attorney's fees and costs under Rule 9011(c)(1)(A).

The bankruptcy court also did not abuse its discretion in its award of reasonable expenses under Rule 8014. The denial of fees for a consulting attorney and expert witness, expediting costs, and certain transcript costs was within the discretion of the court under Rule 8014. The bankruptcy court provided detailed reasons for excluding certain expenses, and Gwynn does not provide any legal support for a contrary decision.

C. The Bankruptcy Court Did Not Abuse Its Discretion When It Imposed a Sanction of $ 14, 000 against Gwynn.

Gwynn argues that the bankruptcy court abused its discretion in the imposition of sanctions in the amount of $ 14,000. The bankruptcy court found that sanctions were appropriate under two statutes, 28 U.S.C. §§ 105, 1927, and its inherent authority to manage its affairs. We need not decide whether the bankruptcy court had the authority to impose sanctions under either section 1927 or section 105 because the court did not abuse its

discretion when it awarded sanctions under its inherent powers.

Federal courts, including bankruptcy courts, have the inherent power to impose sanctions on parties and lawyers. *Byrne v. Nezhat*, 261 F.3d 1075, 1121 (11th Cir. 2001); see also Mroz, 65 F.3d at 1572. To impose sanctions under these inherent powers, the court first must find bad faith. *Mroz*, 65 F.3d at 1575. "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Byrne*, 261 F.3d at 1121 (citations omitted). Sanctions are "especially appropriate where counsel takes frivolous legal positions supported by scandalous accusations." *Amlong & Amlong*, P.A., 500 F.3d at 1238. The court must afford the sanctioned party due process both in determining that the requisite bad faith exists and in assessing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49, 111 S. Ct. 2123, 2135, 115 L. Ed. 2d 27 (1991).

Gwynn does not contend that she did not receive due process in the imposition of sanctions; she instead argues that the filing of the motion did not amount to bad faith. She also contends that a single motion cannot demonstrate bad faith, but requires multiple instances of misconduct. We disagree.

The bankruptcy court did not abuse its discretion when it imposed a sanction for Gwynn's filing of a motion in bad faith. Gwynn's motion alleged that Rotella had made false representations to the court, committed

fraud against the court, and planned to benefit personally at the expense of the creditors. Gwenn's accusations required multiple hearings and led to a counter-motion for sanctions. The seriousness of the allegations combined with the lack of any evidentiary support or minimal investigation support a finding of bad faith.

Gwynn also argues that the record does not support the amount of the sanction. Gwynn argues that the court should not have considered the expenses incurred after she withdrew her motion, and she contends that the estimates made by the court were arbitrary. We disagree.

The court had an ample evidentiary basis for determining the amount of sanctions. Rotella submitted a detailed log of time spent in response to the motion, and the court examined the log, noted entries that were unnecessary or unwarranted, and found the hourly rate to be reasonable. The court also found that Rotella's response to the motion was disproportionate and estimated the amount of time required for a proportional response.

The court did not clearly err when it included Rotella's time spent after Gwynn withdrew her motion for sanctions. See *In re Optical Techs., Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005). It was reasonable for Rotella to file the motion for sanctions because Gwynn's motion contained serious and unfounded allegations of misconduct. The court, in response, had to investigate the foundations of Gwynn's motion.

The estimate by the court as to the time necessary to prepare for and attend the hearing on Gwynn's motion, prepare Rotella's own motion, and prepare for and attend the hearing for Rotella's motion was not arbitrary. Based on Rotella's time entries, the experience of the bankruptcy court with fee applications, and its knowledge of Rotella's experience as an attorney, it was not clearly erroneous for the court to determine that forty hours was a reasonable amount of time to respond to the motion for sanctions. The court exercised restraint in its determination of the appropriate amount when it considered Rotella's disproportionate response and considered only a reasonable amount of time to respond to the unfounded motion. The bankruptcy court did not abuse its discretion when it awarded $ 14,000 in sanctions against Gwynn under its inherent powers.

D. The Bankruptcy Court Did Not Abuse Its Discretion When It Denied Gwynn 's Motion for Recusal.

A judge shall recuse himself if he is personally biased or prejudiced against a party or in favor of an adverse party, or whenever the judge's "impartiality might reasonably be questioned." 28 U.S.C. §§ 144, 455(a). The standard is "whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Christo,* 223 F.3d at 1333. "The general rule is that bias sufficient to disqualify a judge must stem from extrajudicial sources." *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002). "The exception to this rule is 'when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party.' Mere 'friction between the court and

counsel,' however, is not enough to demonstrate 'pervasive bias.'" *Id.* (citation omitted) (quoting *Hamm v. Bd. of Regents*, 708 F.2d 647, 651 (11th Cir. 1983)).

Gwynn contends that she established pervasive bias throughout the court proceeding by the bankruptcy judge, but the grounds cited by Gwynn do not include any extrajudicial sources. Gwynn relies on seven orders, all prepared by Rotella, as evidence of bias, and Gwynn contends that she was not able to respond in time to those orders. Gwynn also relies on adverse rulings and her referral to the Florida Bar by the bankruptcy judge.

Although we have "repeatedly condemned the ghostwriting of judicial orders by litigants," *In re Colony Square Co.*, 819 F.2d 272, 274, 277 (11th Cir. 1987), "such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair," *id.* at 276. Whether the opposing party had "ample opportunity to present its arguments," whether the ruling was "correct as a matter of law," and the frequency of the use of orders prepared by a party are relevant factors to consider. See *id.* at 276-77; *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 & 1374 (11th Cir. 1997).

In the light of the extensive history of this litigation, the seven isolated orders, prepared by Rotella, in a bankruptcy proceeding involving almost 2,000 filings do not evince pervasive bias and prejudice. Gwynn had ample opportunity to be heard. She filed responses, motions to strike, notices of hearings, and motions for reconsideration. Although one order was incorrect as a matter of law, it was reversed by the district court, and

the bankruptcy judge admitted his mistaken reliance on a prepared order. None of the other orders was incorrect as a matter of law.

Adverse rulings are grounds for appeal, but rarely are grounds for recusal, see *Liteky v. United States*, 510 U.S. 540, 554, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994), and referral to a state bar disciplinary board for investigation is not considered a sanction or disciplinary measure, see *United States v. McCorkle*, 321 F.3d 1292, 1298 (11th Cir. 2003). Because a fully informed and objective observer would not entertain significant doubt about the bankruptcy judge's impartiality in the proceedings, see *Christo*, 223 F.3d at 1333, we conclude that the bankruptcy judge did not abuse his discretion in denying the motion for recusal.

III. CONCLUSION

The district court did not err when it vacated the first sanction against Gwynn, and the bankruptcy court did not abuse its discretion in its denial of Gwenn's motion for fees, costs and expenses, its sanction of $ 14,000 against Gwynn, and its denial of Gwynn's motion for recusal.

AFFIRMED.

Filed 4/26/06
CASE NO: 03-32158-BKC-PGH Chapter 7
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

IN RE: JAMES F. WALKER, Debtor.

MEMORANDUM ORDER 1)DENYING AS TO MARY ALICE GWYNN, DEBTOR'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS AGAINST ELEANOR C. COLE AND MARY ALICE GWYNN [C.P. 838]; 2)VACATING AMENDED ORDER GRANTING MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN, ESQUIRE PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 RELATING TO CREDITOR-ELEANOR C. COLE'S MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA, ESQUIRE PURSUANT TO THE COURT'S ORDER OF JULY 17, 2003 (C.P. 1217]: 3)GRANTING GARY J,. ROTELLA. ESQUIRE'S MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN ESQUIRE PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 RELATING TO CREDITOR, ELEANOR C. COLE'S MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA, ESQUIRE PURSUANT TO THE COURT'S ORDER OF JULY 17, 2003 [C.P. 839]; 4) DENYING MARY ALICE GWYNN'S EMERGENCY MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA. ESQ., PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 IN RESPONSE TO MR. ROTELLA'S LETTERS DATED FEBRUARY 9. 2006, AND MARCH 8, 2006 AND DEBTOR'S ATTACHED "MOTION(S) FOR SANCTIONS....." [C.P.1393]; AND 5)DENYING AS

MOOT MARY ALICE GWYNN'S EMERGENCY MOTION FOR TRANSFERRAL OF MARY ALICE GWYNN'S "EMERGENCY MOTION FOR SANCTIONS. . ." DATED MARCH 15, 2006, AND FILED CONCURRENTLY WITH THIS MOTION, TO BE TRANSFERRED TO THE DISTRICT COURT FOR HEARING [C. P. 13 94]

THIS MATTER came before the Court for hearing on April 17, 2006, upon Mary Alice Gwynn, Esquire's ("Gwynn") Emergency Motion for Sanctions Against Gary J. Rotella, Esq., Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 in Response to Mr. Rotella's Letters Dated February 9, 2006, and March 8, 2006 and Debtor's Attached "Motion(s) for Sanctions..... " ("Gwynn's Sanction Motion") [C. P. 1393] which was filed on March 15, 2006; and upon Gwynn's Emergency Motion for Transferral of Mary Alice Gwynn's "Emergency Motion for Sanctions... " Dated March 15, 2006, and Filed Concurrently with this Motion, to Be Transferred to the District Court for Hearing ("Transfer Motion")[C.P. 1394] which was filed on March 15, 2006.

This matter also came before the Court for hearing on February 16, 2006, upon Gary J. Rotella's ("Rotella") Motion For Sanctions Against Mary Alice Gwynn, Esquire, Pursuant To 28 U.S. C. §1927 And 11 U.S.C. §105 Relating To Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire, Pursuant To The Court's Order of July 17, 2003 ("Rotella's Motion for Sanctions") [C.P. 839], which was filed on April 21, 2005; and upon James F. Walker's (the "Debtor") Amended Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole and Mary

Alice Gwynn, Esquire [C.P. 838] (the "Second Amended Discovery Sanctions Motion") which was also filed on April 21, 2005.

BACKGROUND

The Debtor filed for protection under Chapter 7 of the Bankruptcy Code on April 25, 2003. Eleanor C. Cole ("Cole") filed a claim against the estate based upon a final judgment she received against the Debtor in State Court. The Court's docket reflects that Gwynn represented Cole in this case from July 17, 2003 until June 9, 2004.

A. The Numerous Sanctions Motions

This continues to be the most highly litigious and acrimonious case over which this Court has ever presided. Numerous sanctions motions have been, and continue to be brought by each side against the other. The Debtor and/or Rotella have brought three principal motions seeking attorneys' fees and costs against judgment creditor Cole and/or Gwynn as described below.

1. The first principal motion, the Second Amended Discovery Sanctions Motion [C.P.838, which amended C.P.385, which amended C.P. 255], seeks attorneys' fees and costs in the amount of $57,478.25, allegedly incurred by the Debtor in connection with obtaining discovery from Cole. See Rotella's Composite Exhibit "M" subsection "B".[1]

2. The second principal motion, Rotella's Motion

for Sanctions [C.P. 839] initially sought $99,402.50 for attorneys' fees and costs allegedly incurred in connection with Cole's Motion for Sanctions Against Rotella Pursuant To the Court's July 17, 2003 order [C. P. 266] , as detailed in Rotella' s Composite Exhibit "M" subsection "C". The amount of attorneys' fees and costs Rotella now seeks in connection with this matter has increased to $247,613.02 as of February 8, 2006. See Rotella's Ex."O".

3. The third principal motion is the Motion for Sanctions Against Mary Alice Gwynn, Esquire and Creditor Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C.P.360] which sought attorneys' fees and costs incurred in connection with Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Assoc., P.A. ["Rotella P.A."] From Representing the Debtor ("Motion to Disqualify"). The Debtor, Rotella and Rotella P.A. sought attorneys' fees and costs in the amount of $80,572.50 in connection with Cole's Motion to Disqualify as reflected in Rotella's Composite Exhibit "M" subsection "A". The Court awarded these sanctions against Gwynn pursuant to the Court's June 15, 2004, order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C.P. 437] and pursuant to the Court's May 11, 2005, order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 [C.P. 881] (collectively, "Order Awarding 9011 Sanctions"). On March 17, 2006, the Honorable Alan S. Gold entered an order Vacating Final Judgment of Bankruptcy Court (the "District Court Order") in

> the appeal styled Mary Alice Gwynn v. James F. Walker (In re James F. Walker), in the United States District Court for the Southern District of Florida, Lead Case No.05-80714Civ-Gold/Turnoff consolidated with Case No. 05-80715-Civ-Gold/Turnoff. The District Court Order vacated this Court's Order Awarding 9011 Sanctions determining that imposition of Rule 9011 sanctions was inappropriate given that Gwynn's Motion to Disqualify was denied prior to expiration of Rule 9011's twenty-one day safe harbor period. See District Court Order.

B. The Second Amended Discovery Sanctions Motion

The Second Amended Discovery Sanctions Motion is the third in a series of discovery sanctions motions filed by Debtors' counsel pursuant to the Court's March 22, 2004, order Compelling Creditor, Eleanor C. Cole to Answer Interrogatories; Resetting Hearing on Creditor, Eleanor C. Cole's 2004 Examination (C.P. 237); Permitting Debtor to Submit Motion for Attorneys' Fees and Costs; And Acknowledging Withdrawal of Eleanor C. Cole's Motion for Protective order (as to Linda F. Walden) (C.P. 237), (the "March 22, 2004 Order") [C.P.245]. The March 22, 2004 Order granted Debtor and his counsel permission

> to submit their Motion for Attorneys' Fees and Costs with respect to amounts incurred throughout the process of obtaining Creditor Cole's 2004 Examination including, compelling Creditor Cole to provide complete answers to Debtor's Interrogatories subsequent to Creditor

Cole's filing of Notice of Compliance by Creditor Eleanor C. Cole with Debtor's Interrogatories [C.P. 171] and defending Creditor Cole's various Motions for Protective Order.

March 22, 2004 Order Par.4.

Debtor's first motion pursuant to the March 22, 2004 Order was filed on March 29, 2004, it was titled, Debtor's Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole, (the "Discovery Sanctions Motion") [C.P. 255]. The Discovery Sanctions Motion sought $29,040.00 in fees and $1,850.39 in expenses incurred in connection with Debtor's efforts to obtain discovery from Cole during the period November 6, 2003 through March 31,2004. On May 25, 2004, Debtor filed a second motion pursuant to the March 22, 2004 Order titled, Debtor's Amended Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole, (the "Amended Discovery Sanctions Motion") [C.P. 385]. The Amended Discovery Sanctions Motion sought $53,945.00 in fees and $3,533.25 in expenses for the period August 13, 2003 through May 28, 2004. The Amended Discovery Sanctions Motion noted that it included additional time not calculated in the Discovery Sanctions Motion.

The Court's March 22, 2004 Order compelling Cole to cooperate with Debtor's discovery requests had little effect on Cole's discovery misconduct. A year later on April 12, 2005, the Court entered an Order Granting Debtor James F. Wafer's Emergency Motion for Default Judgment Against Eleanor C. Cole as Sanctions for Refusal to Obey Subpoena, Appear and Testify at Deposition, and Amended Motion to Strike

Claim (the "Cole Default order") [C. P. 805] . The Cole Default Order found that Cole, then a pro se litigant, failed to appear or otherwise participate in the April 6, 2005 hearing on Debtor's Emergency Motion for Default Against Cole (the "Motion for Default") [C.P. 772], despite representations by her former counsel, Lawrence U. Taube, that Cole was properly served with the Motion for Default. Cole Default Order at 1. Debtor's counsel's efforts to obtain discovery from Cole from August 13, 2003 through March 25, 2005 are detailed in the Cole Default Order, and they need not be repeated here. See Cole Default Order at 5-17. Among other things, the Cole Default Order found:

> that Cole's refusal to appear and testify at her deposition, while under Subpoena, or to otherwise participate in discovery after twenty (20) months of scheduling and rescheduling her examination, was willful and in complete disregard for this Court, its law and the parties involved in this Proceeding. . . Id. at 17.

As a consequence of Cole's conduct, the Court struck Cole's Proof Of Claim No. 2 and entered a Final Default Judgment against her for $57,478.25, the amount requested in the Amended Discovery Sanctions Motion.[2]

The Amended Discovery Sanctions Motion and various other motions had been set for hearing for April 21, 2005, before entry of the Cole Default Order on April 12, 2005. At the April 21, 2005 hearing, Gwynn stated her belief that the Amended Discovery Sanctions Motion related solely to Cole, not to herself, as she had not been named in the Amended Motion. Debtor's

counsel replied that the Amended Discovery Sanctions Motion related to both Cole and Gwynn. The Court noted that a completely different sanctions motion, Debtor's Motion for Sanctions Against Mary Alice Gwyn, Esq. And Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C.P. 360], was scheduled and that the Amended Motion would not be heard that day.[3] on April 21, 2005, directly after the hearing, Rotella on behalf of the Debtor filed the Second Amended Discovery Sanctions Motion against both Cole and Gwynn for attorneys' fees and costs incurred in connection with Debtor's counsel's effort to obtain discovery from Cole.

The Second Amended Discovery Sanctions Motion was ultimately scheduled for hearing on February 16, 2006, along with Rotella's Motion for Sanctions.

C. Rotella's Motion for Sanctions

Rotella's Motion for Sanctions was originally filed on July 7, 2004 as Rotella's Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant To The Court's Order Of July 17, 2003, ("Rotella's Rule 9011 Sanctions Motion") [C.P. 463] . Rotella's Motion for Sanctions seeks sanctions against Gwynn for her having filed: a) on April 5, 2004, Cole's Motion For Sanctions Against Gary J. Rotella, Esq. Pursuant To The Court's Order Entered On July 17, 2003 ("Cole' s Motion For Sanctions"); b) on April 8, 2004, Cole's Supplement To Motion For Sanctions Against Gary J. Rotella, Esq. Pursuant To the Court's Order Entered On July 17,

2003 ("Cole's Supplement To Motion For Sanctions"); c) on April 28, 2004, Cole's Objection And Response To Susan Lundborg's Motion For Reconsideration Of Order Finding Susan Lundborg In Contempt Of Court And Awarding Sanctions ("Cole's Response To Susan Lundborg"); and d) on May 3, 2004, Cole's Motion To Have The Court Declare The Procurement Of The Sale To The [sic] Susan Lundborg Void, As It Was Procured By Fraud ("Cole's Procurement Motion").

On May 28, 2004, Gwynn, in open Court, announced that she was withdrawing Cole's Motion for Sanctions, and Cole's Supplement to Motion For Sanctions (collectively, "Cole's Motion For Sanctions"). On June 15, 2004, the Court entered an Order Withdrawing Creditor Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant To The Court's Order Of July 17, 2003 ("Order Withdrawing Cole's Motion for Sanctions")[C.P.#439].

Despite entry of the order Withdrawing Cole's Motion for Sanctions, Rotella's Rule 9011 Sanctions Motion was set for hearing on April 21, 2005, along with the Second Amended Discovery Sanctions Motion which is further discussed below. At the April 21, 2005 hearing, Gwynn pointed out, and Rotella conceded, that Rotella had not sent the required twenty-one (21) day safe harbor communication to Gwynn for Rotella's Rule 9011. Sanctions Motion. The Court thereupon denied the Rule 9011 Sanctions Motion without prejudice to it being refiled under any other appropriate grounds. See Order Denying Debtor's Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 and 11 U.S. C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J.

Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 Without Prejudice ("order Denying Rule 9011 Sanctions") [C. P. 880] .

The instant Rotella's Motion for Sanctions was filed directly after the hearing on April 21, 2005. Other than the change in the title, preamble and relief sought from Bankruptcy Rule 9011 to 28 U.S.C. §1927, both motions are identical. Evidentiary hearings on Rotella' s Motion for Sanctions were conducted over two days, on May 20, 2005 and on June 16, 2005 (collectively, the "Sanctions Hearing").

On August 29, 2005, the Court entered an Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §.1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Order")[C.P.1142]. The Order granted Rotella's Motion for Sanctions, and awarded $39,057.50 of the $99,402.50 Rotella sought in attorneys' fees and expenses as listed in Rotella's Composite]Exhibit "M" subsection "C"[4] (the "Fee Statement"). In addition to the Order, the Court contemporaneously entered an Appendix To Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to 28 U.S.C. §.1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Appendix") [C.P.1144]. The Appendix was the Court's annotated version of Rotella's Fee Statement. The Appendix disallowed seven categories of Rotella's time log entries which the Court found: 17 lacked adequate description; 2)were duplicative; 3) were excessive; 4)

were unnecessary; 5) were administrative tasks; 6) were for travel; or 7)were related to a different Cole motion that was not the subject of the Order.

Both Rotella and Gwynn filed motions for reconsideration of the Order; those motions were set for hearing on September 29, 2005. On October 7, 2005, the Court entered an Order Vacating Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 [C.P.1216], wherein the Court vacated the Order based upon the Order's premature award as to the amount of fees.[5]

On October 7, 2005, the Court entered an Amended Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Amended Order") [C.P.1217]. The Amended Order determined that Rotella was entitled to an award of sanctions against Gwynn pursuant to 11 U.S.C. §1927 and 11 U.S.C. §105, but it reserved jurisdiction to determine the amount of sanctions to be imposed. In addition, the Amended Order made numerous specific findings relating to Gwynn's failure to conduct routine investigation before lodging unfounded allegations against Rotella, and to Gwynn's having made inconsistent and contrasting allegations between motions. The Amended Order found Gwynn's allegations to be vexatious, frivolous, and an abuse of process which unreasonably multiplied the proceedings

in this case in violation of 11 U.S.C. §1927 and 11 U.S.C. §105. See Amended Order.

As discussed below the Court, having reviewed Rotella and Gwynn's submissions, the District Court order, and the applicable law, hereby vacates the Amended Order.

D. The February 16, 2006 Hearing

At the commencement of the February 16, 2006 hearing to consider the Second Amended Discovery Sanctions Motion and the amount of sanctions to be imposed against Gwynn pursuant to the Amended order on Rotella's Motion for Sanctions, Gwynn announced that her Emergency Motion for Rehearing and Reconsideration of this Court's "Order Denying Mary Alice Gwynn's Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S.C. §455 and §144" ["Recusal Order"] and "Order Denying Mary Alice Gwynn's Emergency Motion to Stay the Hearing on Debtor's Renewed Motion Scheduled for Bebruary [sic] 16, 2006" ["Stay Order"] dated February 10, 2006, Based Upon Additional Doucmentation [sic] Filed ("Reconsideration Motion") [C.P. 1314] required the Court's determination before the hearing could go forward. The Court informed Gwynn that it had denied her Reconsideration Motion in its February 14, 2006, Order Denying Mary Alice Gwynn's Emergency Motion for Rehearing and Reconsideration of this Court's "Order Denying Mary Alice Gwynn's Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S.C. §455 and §144" and "Order Denying Mary Alice Gwynn's Emergency Motion to Stay the Hearing on Debtor's Renewed Motion

Scheduled for Bebruary [sic] 16, 2006" dated February 10, 2006, Based Upon Additional Doucmentation [sic] Filed ("Order Denying Reconsideration") [C.P.1319].

Gwynn thereupon stated that she was prepared to file an appeal of the Recusal Order, the Stay Order, and the Order Denying Reconsideration, and she further declared that she would not participate in the hearing until the District Court determined her appeal of the Recusal Order. The Court reiterated its ruling denying Gwynn' s motion to stay the hearing pending appeal of the Recusal Order because: 1) the Court believed it was an interlocutory order; and 2) Gwynn failed to state any grounds that would allow her to proceed with an interlocutory appeal. The Court further noted that the hearing had been set for some time and this was the second setting.[6] Gwynn repeated her refusal to participate in the hearing. The Court thereupon granted Gwynn' s request to leave the courtroom, and she left. Debtor's counsel proceeded with its case unopposed.

CONCLUSIONS OF LAW

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a proceeding arising in a case under title 11 pursuant to 28 U.S.C. § 157(b)(1).

I. The Second Amended Discovery Sanctions Motion

The Debtor filed the Second Amended Discovery Sanctions Motion against Cole and Gwynn pursuant to the Court's March 22,2004 order which granted Debtor

and his counsel permission to submit a motion for attorneys' fees and costs incurred in connection with their efforts to obtain discovery from Cole. The Second Amended Discovery Sanctions Motion, however, does not cite any authority other than the March 22, 2004 order, as a basis for an award of attorneys' fees and costs against Gwynn. Therefore it is left to the Court to determine on what basis, if any, an imposition of sanctions against Gwynn would be appropriate.

The Court has both statutory authority and inherent power to award sanctions when required. The Court has inherent power to sanction attorneys who act in bad faith, vexatiously, wantonly or for oppressive reasons Chambers v. Masco, Inc., 501 U.S. 32, 45-46 (1991). The exercise of such powers by a Bankruptcy Court is consistent with the authority granted by 11 U.S.C. § 105 to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." See, e.g., Jove Eng'g, Inc., v. Internal Revenue Service, 92 F. 3d 1539 (11th Cir. 1996). "However because of their potent nature,'inherent powers must be exercised with restraint and discretion.'" In re Mroz, 65 F. 3d 1567, 1575 (11th Cir. 1995) (citing Chambers, 501 U.S. at 42-43). When conduct can be "adequately sanctioned under the Rules, the Court should ordinarily rely on the Rules rather than their inherent power." Chambers, 501 U.S. at 50. Bankruptcy Rule 7037 "Failure to Make Discovery: Sanctions" deals directly with the type of discovery abuses complained of in the Second Amended Discovery Sanctions Motion.[7] Bankruptcy Rule 7037 applies to contested matters as well as to adversary proceedings. See B. R. 9014 (c). Thus the Court finds that Bankruptcy Rule 7037, rather than the Court's inherent power, is the appropriate authority to rely

upon in this matter.[8]

Bankruptcy Rule 7037 states in pertinent part:

> (a) Motion for Order Compelling Disclosure or Discovery (4) Expenses and Sanctions.
>
> > (4)If the motion is granted . . . the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, . . .
>
> (b) Failure to Comply with Order
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, . . .
>
> (d) Failure of Party to Attend at own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection
>
> In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure...

B.R. 7037 (emphasis added)

Rule 7037 subsection (a) provides the procedure for motions for orders compelling disclosure and discovery. B.R.7037(a). Rule 7037 subsections (b) and (d) provide for sanctions against a party who fails to comply with a court order compelling disclosure and discovery, fails to attend their own deposition, or fails to serve answers to interrogatories. B.R.7037 (b) and (d). In each instance, the attorney may also be sanctioned under Rule 7037.

Discovery abuses frustrate the purpose of the Federal Rules of Civil Procedure which is to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. "Rule [7037] sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Roadway Exp., Inc. v. Piper, 447 U.S. 752, 763 (1980) (quoting Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976)). Rule 7037 sanctions "serve a threefold purpose. Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. Rule [7037] strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. Finally, although the most drastic sanctions may not be imposed as 'mere penalties,' courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault." JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Serv. Inc., (S.D.N.Y. 2005) 2005 WL 1958361 *10

(quoting Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures, Corp., 602 F. 2d 1062, 1066 (2d Cir. 1979)). Rule 7037 thus gives the Court discretion to apportion fault for discovery abuses by permitting the Court to impose sanctions upon a party, its attorney or both. Devaney v. Continental American Ins. Co., 989 F. 2d 1154, 1160 (11th Cir. 1993)

The Court previously ruled that "Cole's refusal to appear and testify at her deposition, while under Subpoena, or to otherwise participate in discovery after twenty (20)months of scheduling and rescheduling her examination, was willful and in complete disregard for this Court, its law and the parties involved in this Proceeding." Cole Default order at 17. However, the Court finds that there has been no evidence presented that Cole's obstructive discovery conduct was Gwynn's fault, having either been carried out at Gwynn's direction or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advising Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exists no basis pursuant to B.R. 7037 or pursuant to any other authority, for the Court to assess sanctions against Gwynn for Cole's discovery misconduct. Accordingly, the Second Amended Discovery Sanctions Motion is denied as to Gwynn.

II. The Amended Order on Rotella's Motion for Sanctions is Vacated

A. The Amended Order's Conclusions of Law are Incorrect

The Amended order on Rotella's Motion for Sanctions determined that imposition of sanctions against Gwynn was appropriate pursuant to 28 U.S.C. §1927 and 11

U.S.C. § 105.

Section 1927 of title 28 of the United States Code provides:

> Any attorney or other person admitted to conduct such cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. §1927

The Amended order noted three requirements for imposition of sanctions pursuant to §1927: 1) the attorney in question must engage in "unreasonable and vexatious" conduct; 2) such conduct must multiply the proceedings, and 3) "the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir. 1997) (citing 28 U.S.C. § 1927). However upon review, the Court finds that the Amended order failed to fully examine section 1927's requirements. In light of the recently entered District Court Order, the Court does so now.

"There is little case law in this circuit concerning the standards applicable to the award of sanctions under §1927." Id. "Moreover, decisions from other circuits are not in agreement on the governing principles. Some

circuits have held that subjective bad faith is required for an award [of sanctions] under §1927. Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986); Hackman v. Valley Fair, 932 F.2d 239, 242 (3d Cir. 1991). Other circuits have held that it is not. See Wilson-Simmons v. Lake County Sheriff's Dep't, 207 F.3d 818, 824 (6th Cir. 2000); Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 (10th Cir. 1998)." Footman v. Cheung, 341 F. Supp. 2d 1218, 1222-23 (M.D. Fla. 2004).

The Eleventh Circuit recently acknowledged that its "cases are perhaps somewhat unclear [with respect to the requirements of section 1927]; either they require subjective bad faith, which may be inferred from reckless conduct, or they merely require reckless conduct, which is considered 'tantamount to bad faith.'" Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1178 (11th Cir. 2005). The Cordoba court speculated as to whether the distinction is ever significant, and declined to provide an answer since it was not important for purposes of that case. Id.

The Amended Order in this case omitted any consideration of Gwynn's subjective bad faith, or of whether her conduct was tantamount to bad faith. Thus, the Amended Order's finding that Gwynn was liable for sanctions pursuant to section 1927 is not in keeping with the Eleventh Circuit's test for imposition of section 1927 sanctions and the Amended Order must be vacated.[9]

The Amended Order also found Gwynn liable for sanctions pursuant to 11 U.S.C. §105, which states in pertinent part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a)

The Eleventh Circuit has found that section 105 gives bankruptcy courts civil contempt powers to impose monetary sanctions when there is clear and convincing evidence that a court order has been violated, as for example, in the event of a willful automatic stay violation. See Jove Eng'g, Inc.,92 F.3d 1539. The Amended Order cited Hardy v. United States (In re Hardy), 97 F. 3d 1384, 1389-90 (11th Cir. 1996)[10] as authority for the distinction between section 105's grant of statutory contempt powers in the bankruptcy context, and the court's inherent contempt powers which require a finding of "bad faith". Id. The Amended Order then incorrectly implied that pursuant to section 105 bankruptcy courts may sanction an attorney who unreasonably and vexatiously multiplies the proceedings without making a finding of subjective bad faith or conduct tantamount to bad faith. The Amended Order cited In re Volpert, 110 F. 3d 494, 500 (7th Cir. 1997) (citing Caldwell v. Unified Capital Corp. (In re Rainbow Magazine), 77 F. 3d 278, 283-84 (9th Cir. 1996) ; Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.), 40 F.3d 1084, 1089 (10th Cir. 1994)), as authority for

imposition of sanctions pursuant to section 105 for unreasonable and vexatious multiplications of proceedings without finding subjective bad faith or conduct tantamount to bad faith. However, bad f aith was a factor in each of those cases. In Rainbow Magazine and Courtesy Inns, section 105 sanctions were imposed for bad faith filings of bankruptcy petitions. Id. at 501. In Volpert, the Seventh Circuit affirmed a bankruptcy court award of sanctions for an attorney's bad faith filings, however Volpert found that the appropriate sanctioning mechanism was 11 U.S.C. § 105 rather than 28 U.S.C. §1927 which was the bankruptcy court's basis for the award.[11] Id.

This Court does not interpret section 105 to permit an award of attorney's fees for unreasonable and vexatious multiplication of proceedings absent a finding of subjective bad faith or conduct tantamount to bad faith. Fee shifting is generally prohibited under the American Rule. With the exception of very "narrowly defined circumstances," each party pays its own way. Chambers, 501 U.S. at 45 (citations omitted). The Court finds that Congress did not intend to allow bankruptcy courts to impose sanctions pursuant to 11 U.S.C. § 105 using a less stringent standard than that required for imposition of sanctions pursuant to 28 U.S.C. §1927. To the extent that the Amended order implied that sanctions may be imposed for unreasonable and vexatious multiplication of proceedings pursuant to § 105 absent a finding of subjective bad faith, or conduct tantamount to bad faith, the Amended order was incorrect.

B. The Court Reaffirms the Amended Order's Findings Notwithstanding the Amended order's incorrect interpretation of law, its findings of fact are correct.

Rotella's Motion for Sanctions is based upon Gwynn's having filed Cole's Motion for Sanctions, Cole's Supplement to the Motion for Sanctions, Cole's Response to Susan Lundborg, and Cole's Procurement Motion. One of the primary themes of Cole's Motion For Sanctions is that "Rotella orchestrated a well thought out plan to sell the Cat Cay Property during July, 2003." This theme was similarly expounded upon in Cole's Response To Susan Lundborg, and Cole's Procurement Motion. However, some of the allegations in Cole's Response to Susan Lundborg and Cole's Procurement Motion contradict the allegations in Cole's Motion for Sanctions. Cole's Motion For Sanctions asserts that Rotella orchestrated the sale of the Cat Cay property, while Cole's Response To Susan Lundborg asserts that Susan Lundborg and her attorney Stephen A. Turnquest were solely responsible for the sale of the Cat Cay property. In addition to these contrasting allegations, the motions contain numerous allegations against Rotella including that he had perpetrated a fraud upon the Court, that he was "generally dishonest", and that he had not been forthright with the creditors or trustee.
The Court hereby reaffirms the Amended order's findings of fact as follows:

1. Gwynn neither produced nor admitted any competent evidence to establish that she had any basis in fact or law as of April 5, 2004, to support the allegation within Cole's Motion For Sanctions that Rotella "orchestrated a well thought out plan" to sell

the Cat Cay Property during July 2003.

2. Gwynn failed to produce any evidence to support the allegation that Rotella created a sham or perpetrated a "fraud on this Court" with respect to filing Debtor's Emergency Motion To Stay Sale Of Debtor's Interest In Real Property In Violation Of 11 U.S.C. § 362, B.R. 6004-1 And Local Rule 6004-1 ("Motion to Stay Sale").

3. Rotella took Gwynn's Deposition on June 8, 2004 prior to filing his 9011 Motion For Sanctions. While Gwynn said that the allegations in Cole's Motion for Sanctions were true and correct when she signed them, she evaded questions regarding her factual basis for alleging that Rotella orchestrated the sale of the Cat Cay Property. Gwynn repeatedly objected to Rotella's questions on the basis that her answers were protected by work product and/or attorney-client privilege. She evaded answering by repeating her objections, and by referring to Cole's Motion for Sanctions saying "the pleading speaks for itself." Gwynn' s attempts to offer any factual predicate for filing Cole's Motion for Sanctions were disjointed and fragmented.

4. Gwynn's refusal to answer questions relative to any factual and legal basis for the allegations contained in Cole's Motion for Sanctions at the June 8,2004 deposition, was not remedied by the Sanctions Hearing. Gwynn's testimony was disjointed, confused, incoherent, and oftentimes unresponsive to the questions. Gwynn gave no credible testimony establishing any factual or legal basis as of April 5, 2004 for the allegations she advanced against Rotella in Cole's Motion for Sanctions.

5. Gwynn alleged in Cole's Motion for Sanctions that Rotella was "generally dishonest." Paragraph 5 accuses Rotella of disregarding Bankruptcy Rules, continually making false representations to this Court, and being other than forthright with "any of the creditors, the Trustee and/or counsels." In support of this allegation Gwynn testified at the Sanctions Hearing that Rotella never listed the Receivership Proceeding in the Debtor's original Statement Of Financial Affairs. The Statement of Financial Affairs filed with the Court on May 23, 200 lists the Receivership Proceeding[12] as pending. When Rotella pointed out that the Receivership Proceeding was listed as pending, Gwynn claimed that she did not see this entry on the "initial" Schedules. However, the record reflects that the Debtor's Schedules were never amended. It is clear that Gwynn did not investigate whether Rotella listed the Receivership Proceeding because this could have been verified easily by reading the Debtor's Statement of Financial Affairs. Gwynn had no basis on April 5, 2004 for her allegation that Rotella was "generally dishonest" in not listing the Receivership Proceeding. She did not provide any competent evidence to the contrary throughout the Sanctions Hearing.

6. Gwynn alleged that Rotella deceived the Court and creditors by failing to list the Cat Cay Property in response to Question 6 in the Debtor's Statement of Financial Affairs, which requires a list of all property "which has been in the hands of a custodian, receiver, or court appointed official within one year immediately proceeding the commencement of the case." Gwynn testified that this response was a false representation by Rotella because the State Court Receiver, Linda

Walden, was about to take control of the Cat Cay Property. Although it was Gwynn's contention that the Receiver was about to take control of the Cat Cay Property, in fact the Receiver had not been in control of it at any time prior to the Debtor filing his Statement of Financial Affairs. The Court finds that Gwynn's allegations of Rotella's "general dishonesty," his disregarding Bankruptcy Rules, his continually making false representations to this Court, and his being other than forthright with "any of the creditors, the Trustee and/or counsels" were unreasonable.

7. Gwynn alleged in Paragraph 5 of Cole's Motion For Sanctions that Rotella failed to disclose or otherwise list the Debtor's interest in real property in Washington County, Florida (the "Washington County Property") in the Debtor's Statement of Financial Affairs and accompanying Schedules. However Question 10 of the original Statement of Financial Affairs does list the Debtor's interest in the Washington County Property along with its full legal description. Gwynn should have reviewed Question 10 before making this allegation. Consequently, the Court finds that Gwynn had no basis on April 5, 2004 for her allegation that Rotella was "generally dishonest" in not listing the Washington County Property and provided no evidence to the contrary throughout the Sanctions Hearing.

8. Gwynn alleged at paragraph 7 of Cole's Motion for Sanctions that Rotella's listing the Debtor's interest in the Cat Cay Property as exempt was another example of Rotella's general dishonesty and being other than forthright with "any of the Creditors, the Trustee and/or counsels." Cole's Motion for Sanctions and

Gwynn's testimony at the Sanctions Hearing alleged that Rotella knew all along that the property was held as tenants in common. This allegation is unfounded both in fact and in law. While the Debtor's position that the Cat Cay Property was exempt as a tenancy by the entireties was disallowed by the Court, Gwynn had no factual basis for accusing Rotella of dishonesty for taking the legal position that the Cat Cay Property was exempt from the Debtor's estate. Gwynn undertook no investigation to substantiate her allegation. She did not depose Rotella or ask him about any legal research he may have conducted on the question of whether the Cat Cay Property was exempt prior to the Debtor's filing his Statement of Financial Affairs and Schedules. Consequently, the Court finds that Gwynn had no basis on April 5, 2004, in fact or law, for her allegation that Rotella was "generally dishonest" in listing the Debtor's interest in the Cat Cay Property as exempt. She provided no competent evidence to the contrary throughout the Sanctions Hearing.

9. Gwynn accused Rotella of failing to send a Suggestion of Bankruptcy to the Trustee, Linda Walden. However, the Certificate of Mailing on the Suggestion of Bankruptcy shows that it was sent by U.S. Mail and Facsimile to "H. Michael Muniz, Esquire, Sachs, Sax & Klein, P.A., Attorneys for Receiver, Linda J. Walden, MBA, CPA, Northern Trust Plaza, 301 Yamato Road, Suite 4150, Boca Raton, FL 33431. . . this 25th day of April, 2003". Gwynn asserted that H. Michael Muniz never received the Suggestion of Bankruptcy and that a review of her correspondence with Mr. Muniz refreshed her recollection that he did not receive the Suggestion of Bankruptcy either. However, Gwynn neither produced the

correspondences or records of these exchanges, nor did she have Mr. Muniz testify before the Court. The prima facie proof of service established by the Certificate of Service is presumptively valid as a matter of law. Gwynn provided no competent evidence establishing that she had any factual or legal basis for having made the allegation that Rotella never sent the Suggestion of Bankruptcy to the Receiver or her counsel.

10. Gwynn alleged in Paragraph 14 of Coles' Motion for Sanctions that attorney Collie never received a Notice of Filing Chapter 7 Bankruptcy. Gwynn's allegation is similarly without merit because Gwynn produced no evidence to counter the Certificate of Service.

11. Throughout her June 16, 2005 hearing testimony, Gwynn said that she would be "bringing matters" before this Court by way of her "Motion for All Remedies," which was heard and decided by the Court on July 1, 2005. The Court's Order Denying Motion for All Remedies [C. P. 11031 found that there was no evidence to support Gwynn's Sanctions Hearing allegation that ". . . there's some fee-splitting going on with other people." The Court did however find that Rotella untimely filed his Second Amended Disclosure of Compensation of Attorney for Debtor to the United States Trustee ("Second Amended Disclosure of Compensation"), but there was no evidence of any intentional wrongdoing by Rotella. Gwynn did not raise the limited issue of timeliness in Cole's Motion For Sanctions or at the Sanctions Hearing. Consequently, the Court finds that Gwynn lacked any basis in fact or law as of April 5, 2004 to have alleged that Rotella engaged in illegal fee splitting. She produced no

competent evidence to support her allegation at either the Sanctions Hearing or the hearing on Motion For All Remedies.

12. Gwynn alleged at Paragraph 5 of Cole's Motion For Sanctions that Rotella's failure to obtain Court approval for his guarantee of payment by the Debtor's wife exemplifies Rotella's alleged disregard for Bankruptcy Rules, his false representations to the Court, and his being other than forthright with "any of the creditors, the Trustee and/or counsels". At the June 16, 2005 hearing, Gwynn suggested that Bankruptcy Rule 2016 requires that Rotella obtain a court order approving his fee arrangement with the Debtor's wife, Carol Ann Walker. Rule 2016(b) requires the attorney to file a statement disclosing compensation with the United States Trustee, but the rule does not require the attorney to receive a court order to approve the arrangement for compensation. Rotella's Second Amended Disclosure of Compensation reports that Rotella received additional compensation from the Debtor's son as well as the guarantee of payment from Carol Ann Walker, the Debtor's wife, from her fifty-percent (50%) interest in the proceeds of the sale of the Cat Cay Property. Although Rotella's Second Amended Disclosure of Compensation was untimely filed, there was no evidence of intentional wrongdoing on Rotella's part.[13] Because there is no requirement for obtaining Court approval, Gwynn could not possibly have had any legal basis for this allegation.

13. Gwynn alleged in Paragraph 6 of Cole's Motion For Sanctions that Rotella filed an Ex-Parte Motion for Extension of Time in Which to File Statement of Financial Affairs and Schedules ("Ex-Parte Motion to

Extend") knowing all along that Creditor Cole had counsel and that Walden was appointed as a Receiver. She further alleged that none of the parties received copies of Rotella's Ex-Parte Motion To Extend. However Gwynn's testimony at the June 16, 2005 hearing revealed that she made no inquiry of any of the creditors or other interested parties listed on the Certificate Of Service as to whether they had received the Ex-Parte Motion to Extend. Local Rule 9013-1 (C)(2)[14] permits ex-parte relief for an extension of time to file the Statement Of Financial Affairs and Schedules. Rotella's Ex-Parte Motion to Extend dated May 7, 2003 and filed May 9, 2003 bears a Certificate Of Service listing ten (10) creditors and/or other interested parties, including the then-Trustee, Deborah Menotte, as well as Cole's counsel, H. Michael Muniz. Gwynn offered no evidence or testimony that Muniz was not served with the Ex-Parte Motion to Extend. Moreover, Walden was not the Trustee at this point in the case, she was merely the Receiver from a State Court action against the Debtor. Gwynn produced no evidence that either she or Walden had requested notice of all motions in the case. Therefore, neither Gwynn nor Walden were entitled to notice. Gwynn's failure to receive notice is not a ground upon which to sanction the Debtor's attorney. This is an example of Gwynn's continuing failure to examine the Local Rules before lodging unfounded allegations.

14. Gwynn alleges in Paragraph 22 of Cole's Motion For Sanctions, that Rotella's filing Debtor's Motion To Stay Sale on July 15, 2003 was a "sham and a fraud on this Court," and that the sale of the Cat Cay Property was, in tandem, "orchestrated by Lundborg, along with Rotella, Turnquest and Collie (who) have a hidden

agenda to purchase the Cat Cay property at a discount price and turn around and flip the property as soon as the sale had gone through, at a much higher price".[15] Rotella asked Gwynn whether she had any evidence to support the allegations of his wrongdoing set forth within Cole's Motion For Sanctions in Paragraphs 9, 11, 14, 15, 16, 20, 21, 23, 26 and 27. Gwynn generally testified that she was without anything material to offer in terms of documentary evidence or testimony to substantiate her allegations.

15. Gwynn testified at the May 20, 2005 hearing, that the Debtor fraudulently obtained an order from the court in his criminal case that allowed him to travel to the Bahamas to sell the Cat Cay Property. The transcript of the July 3, 2003 hearing[16] reflects that the State Court authorized the Debtor to travel to California and to travel to the Bahamas if the Cat Cay Property was sold by order of the Bankruptcy Court. This Court sees nothing improper with the Debtor's criminal counsel requesting permission from the State Court for the Debtor to travel to the Bahamas in the event that this Court ordered him to attend the sale of the Cat Cay Property. Whatever concerns Gwynn had regarding the State Court's July 3, 2003 authorization for the Debtor's travel to the Bahamas, she did not raise those concerns in State Court, but waited until she filed Cole's Motion for Sanctions ten months later. Gwynn provided no competent evidence for alleging that Rotella committed "a sham and a fraud on this Court" by "generating" or otherwise procuring a fraudulent order from the State Court allowing the Debtor to travel to the Bahamas to complete a sale of the Cat Cay Property.

16. Gwynn alleged in Cole's Motion For sanctions at Paragraph 15 that "attorney Collie also informed Walden of other instructions he received from Rotella, that will prove Rotella orchestrated this whole sale in July, hoping that the sale would go through covertly, before anyone here would have knowledge of it. . . . Walden will present additional testimony on the conversations that she had with attorney Collie." Walden, under Subpoena Duces Tecum issued by Gwynn, failed to appear and testify at the May 20, 2005 hearing and again failed to appear and testify at the June 16, 2005 hearing as required under the Renewed Subpoena Duces Tecum. Walden's failure to testify notwithstanding, Gwynn produced no evidence whatsoever to substantiate, or otherwise establish, that she had any basis in fact or in law for making the allegations against Rotella on April 5, 2004. Gwynn's references to the Bahamian Court orders as "doctored" are similarly unsubstantiated. In addition, the testimony of Gwynn's witness, Robert Angueira, did not support Gwynn's allegations that the Bahamian Court orders were "doctored."

17. At the June 16,2005 hearing, the Court attempted to understand Gwynn's allegation that Rotella' s Motion to Stay the Sale was a fraud on the Court. Gwynn testified that Rotella' s objective in filing the Motion to Stay the Sale was to put herself, Linda Walden, and Robert Angueira in a bad light. Gwynn further testified that the Debtor's attempt to stop the sale was contradicted by the Debtor's attempt to get an order from the State Court allowing him to travel to the Bahamas so that he could complete the sale. The record reflects that the Debtor's primary objective in filing the Motion to Stay the Sale was to stop the sale of

the Cat Cay Property to Susan Lundborg. Therefore, the Debtor's intentions in filing the Motion to Stay the Sale were not fraudulent.

18. Gwynn alleged that the Debtor sought contradictory relief in State Court and in this Court. On the one hand, she alleged that the Debtor sought permission to travel to the Bahamas to complete a covert sale of the Cat Cay Property in league with Rotella, Susan Lundborg, and her attorneys. On the other hand, she alleged that Rotella and the Debtor sought contradictory relief from this Court when they sought to stop the sale to Susan Lundborg. The July 3, 2003 hearing transcript reveals that the Debtor did not seek contradictory forms of relief in this Court and the State Court. First, the Debtor sought an order only that would permit him to travel to California where his son lives. Second, the Debtor sought permission from the State Court to travel to the Bahamas in case this Court authorized the sale of the Cat Cay Property. Finally, subsequent to the Debtor's filing his bankruptcy petition, he moved this Court to stay the sale in case he prevailed on his claim that the Cat Cay Property was exempt. There is no evidence that the Debtor sought to complete a covert sale to Susan Lundborg without this Court's knowledge. On the contrary, the Debtor has fought the sale of the Cat Cay Property since the Debtor's interest in the Cat Cay Property became an object of interest for creditors. Had Gwynn read the July 3, 2003 hearing transcript with minimal care and attention, she would have determined that the Debtor did not seek contradictory forms of relief. The allegation that the Motion to Stay the Sale was a fraud on the Court is wholly without merit.

19. The Court notes that many of Gwynn's allegations would not have been lodged, if she had undertaken the most routine forms of investigation and research. One form of investigation would have been for Gwynn to take Rotella's Deposition prior to filing Cole's Motion For Sanctions. However, she did not. Instead, she took Rotella's Deposition some seven (7) weeks after filing Cole's Motion For Sanctions, and only four (4) days before the scheduled hearing on Cole's Motion For Sanctions. Moreover, there is no excuse for her failure to acquaint herself with the Federal Rules of Bankruptcy Procedure and the Local Rules, or to read the July 3, 2003 hearing transcript closely.

C. The Court Finds Gwynn's Conduct is Tantamount to Bad Faith

There is no doubt that Gwynn's conduct, as evidenced by the above findings, was objectively unreasonable and vexatious. However, the Court's Amended Order did not consider whether Gwynn's vexatious and unreasonable conduct was conduct tantamount to bad faith or carried out in subjective bad faith, as required in the Eleventh Circuit for imposition of sanctions pursuant to 11 U.S.C. 1927. Cordoba, 419 F.3d at 1178. "In assessing whether an award is proper under the bad faith standard, the inquiry will focus primarily on the conduct and motive of a party, rather than the validity of the case.'" Footman, 341 F. Supp. 2d at 1223 (citing Rothenburg v. Sec. Mgmt. Co., Inc., 736 F. 2d 1470, 1472 (11th Cir. 1984)). Subjective bad faith requires an improper motive, such as for example, a motive to delay judicial proceedings. Subjective bad faith is a higher standard than objective bad faith which does not

require conscious impropriety. Jerelds v. City of Orlando, 194 F. Supp. 2d 1305, 1312 (M.D. Fla. 2002)(citations omitted).

Conduct tantamount to bad faith may be found where "an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering the enforcement of a court order." Footman, 341 F. Supp. 2d at 1223 (citing Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998)). A finding that conduct is tantamount to bad faith is also warranted "where an attorney knowingly or recklessly pursues a frivolous claim or engages in litigation tactics that needlessly obstruct the litigation of nonfrivolous claims." Bernstein v. Boles, Schiller & Flexner, LLP, 2006 WL 465054 *2 (S.D. Fla. 2006) (citing Schwartz v. Million Air, Inc., 341 F. 3d 1220, 1225 (11th Cir. 2003)). Section 1927 is designed to sanction attorneys who willfully abuse the judicial process by conduct tantamount to bad faith. Id.

In this matter the Court finds that Gwynn's conduct has been sufficiently reckless to warrant a finding of conduct tantamount to bad faith. The Court further finds that her frivolous claims were prosecuted for the purpose of harassing her opponent such that her conduct has been tantamount to bad faith. Gwynn failed to conduct even the most routine investigation before lodging completely unfounded allegations regarding Rotella's honesty and candor with the Court. It is bad faith and an abuse of process for Gwynn to lodge unfounded and uninvestigated allegations that opposing counsel perpetrated a fraud upon the Court and was

generally dishonest, then withdraw the pleadings containing those allegations at the hearing without notice to Rotella, and maintain that based upon that withdrawal she should not be sanctioned. The above-detailed findings evidence Gwynn's bad faith and willful abuse of the judicial system which multiplied the proceedings in this case unreasonably and vexatiously.

D. Due Process

Rotella's Motion for Sanctions was originally filed as Rotella's Rule 9011 Sanctions Motion. Federal Rule of Civil Procedure 11[17] is aimed primarily at pleadings. Byrne v Nezhat, 261 F. 3d 1075, 1106 (11th Cir. 2001). The analysis in considering a motion for sanctions pursuant to Rule 9011 is a two step inquiry: "1) whether the party's claims are objectively frivolous; and 2) whether the person who signed the pleading should have been aware that they were frivolous." Id. at 1105 (citing Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1988)). Based upon the Court's findings of fact, the Court can easily answer in the affirmative for each of the steps in the Rule 9011 two step inquiry. However, that does not conclude the Court's Rule 9011 analysis. The 1993 amendments to Rule 11 added "a twenty-one day period of 'safe harbor' whereby the offending party can avoid sanctions altogether by withdrawing or correcting the challenged document or position after receiving notice of the allegedly violative conduct. . . . The inclusion of a 'safe harbor' provision [was] expected to reduce Rule 11's volume, formalize appropriate due process considerations of sanctions litigation, and diminish the rule's chilling effect." Ridder v. City of Springfield, 109 F.3d 288, 294 (6th Cir. 1997) (citations omitted).[18]

Rotella failed to follow the absolute procedural requirements of Rule 9011. Rotella's Rule 9011 Sanctions Motion related to frivolous and conflicting allegations contained in four motions filed by Gwynn on behalf of Cole between April 5, 2004 and May 3, 2004. On May 28, 2004, Gwynn in open Court withdrew Cole's Motion for Sanctions. The Court entered the order Withdrawing Cole's Motion for Sanctions on June 15, 2004. Yet as disclosed at the April 21, 2005 hearing, Rotella never sent a Rule 9011 safe harbor communication to Gwynn. Not having sent a Rule 9011 safe harbor communication to Gwynn, Rotella nevertheless filed his Motion for Rule 9011 Sanctions on July 7, 2004 after Gwynn withdrew Cole's Motion for Sanctions. Based upon Rotella's failure to follow the Rule 9011 procedure, the Court denied Rotella's Rule 9011 Sanctions Motion. The Court's Order Denying Rule 9011 Sanctions was entered without prejudice to Rotella refiling under any other appropriate grounds.

Rotella refiled his Rule 9011 Sanctions Motion as a Motion for Sanctions pursuant to 28 U.S.C. § 1927 and 11 U.S.C. §105 on April 21, 2005 directly after the hearing at which it was determined that a Rule 9011 communication had not been sent to Gwynn. The unavailability of Rule 9011 sanctions in this matter does not rule out the possibility of assessing sanctions against Gwynn pursuant to section 1927 and/or pursuant to section 105.[19] Ridder, 109 F.3d at 297. Section 1927 "is concerned only with limiting the abuse of court processes." Roadway Express, 447 U.S. at 762. "Unlike Rule [9011] sanctions, a motion for excess costs and attorneys fees under § 1927 is not predicated upon a 'safe harbor' period, nor is the motion untimely if

made after the final judgment in a case." Ridder, 109 F.3d at 297. "The purpose of §1927 is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs bear them."Boler v. Space Gateway Support Co. LLC, 290 F. Supp.2d 1272,1277 (M.D. Fla. 2003).

While the Court has "considerable discretion in imposing sanctions, it is settled law that an attorney must have notice and an opportunity to be heard on the possibility of being sanctioned, consistent with the mandates of the due process clause of the Constitution." Anjelino v. New York Times Co., 200 F.3d 73, 100 (3d Cir. 2000) (citations omitted). "Due process requires that an attorney be given fair notice that his conduct may warrant sanctions and the reasons why." Mroz, 65 F.3d at 1575 (citing Donaldson v. Clark, 819 F.2d 1551, 1559-60 (11th Cir. 1987). "Notice can come from the party seeking sanctions, from the court, or from both." Id. "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct-" Carlucci v. Piper Aircraft Corp., Inc., 775 F.2d 1440, 1452 (11th Cir. 1985) (quoting Link v. Wabash R. Co., 370 U.S. 626, 632 (1962)).

The circumstances here show that Gwynn may be taken to have knowledge of the consequences of her conduct. Indeed as a member of the bar, Gwynn had knowledge of the consequences of her conduct. Gwynn's professional responsibilities required her to perform a reasonably thorough investigation of the facts before making unfounded allegations. See e.g. Byrne, 261 F. 3d

at 1115. Rotella's Motion for Sanctions and the numerous other sanctions motions filed in this case provided adequate notice to Gwynn that Rotella was seeking sanctions based upon her reckless and frivolous claims. Gwynn filed written responses to the Motion for Sanctions as well as motions to continue hearings that had been set on the various sanctions motions. The Court's repeated admonitions provided additional notice to Gwynn that sanctions might be imposed as a consequence of her conduct. Having received adequate notice, Gwynn was given ample opportunity to be heard, and in fact was heard, over two days of evidentiary hearings. The Court finds that the mandates of due process have been satisfied.

E. The Amount of Sanctions

The imposition of sanctions is a matter of discretion for the Court. The Court finds that Rotella also contributed to the unreasonable multiplication of proceedings in this case. Rotella's Motion for Sanctions originally sought $99,402.50 for fees and costs allegedly incurred in this matter through March 18, 2005. He now seeks fees and costs in the amount of $241,270.00 through February 8, 2006. Indeed, Rotella has represented to the Court that the fees and costs he incurred are actually several times more than the amount he seeks here. In addition, the Second Amended Discovery Sanctions Motions seeks $57,478.25 and Rotella's sanctions motion for Cole's Motion to Disqualify sought $80,572.50.[20] The amounts sought by Rotella juxtaposed against the estate having received total funds of $56,028.20 through December 31, 2005,[21] compels the Court to ask what has gone wrong? Taken as a whole, the grossly excessive amount of sanctions sought by Rotella shocks this Court's

conscience.

The Court recognizes that many of Gwynn's allegations have been unsubstantiated scurrilous attacks on Rotella. While the Court in no way condones Gwynn's failure to conduct herself professionally as an attorney, Rotella's responses have been disproportionately "over the top". For example, Rotella recently filed a Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to Bankruptcy Rule 9011, 28 U.S.C. §1927 and 11 U.S.C. §105 and Referral to the Florida Bar for Prohibition from Practicing Before the United States Bankruptcy Court of Florida and for Referral to the Florida Bar (the "Recusal Sanctions Motion")[C.P.1358] seeking sanctions against Gwynn based upon her having filed an Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S. C. §455 and §144 (the "Recusal Motion") . Rotella' s Recusal Sanctions Motion was filed after the Court denied both Gwynn's Recusal Motion and her motion for rehearing of the same. The Court's order denying Rotella's Recusal Sanctions Motion [C.P.#1381) found that Gwynn's Recusal Motion required neither a response nor a Court appearance by Rotella, and that Rotella lacked any basis in law to bring the Recusal Sanctions Motion insofar as it sought sanctions related to Gwynn's Recusal Motion.

Nevertheless, Rotella then filed a twenty-nine page Motion To Rehear, Reconsider and/or Amend Order Denying. . . [the Recusal Sanctions Motion](the "Motion to Rehear") [C.P.1405]. In denying Rotella's Motion to Rehear, the Court found that "not only [wa] s it without merit, but it [wa]s a perfect example of why this has been the most litigious case that has ever come before

this Court." See Order Denying . . .[Motion to Rehear] ("order Denying Rehearing") [C . P . # 14101. The order Denying Rehearing noted that "[m]ore than 1400 docket entries have been made in the three years that this case has dragged on, a pace that rivals most complex chapter 11 cases. However, this is not a complex chapter 11 case, this is an individual chapter 7 case with a small number of parties. The judicial resources expended and the expenses incurred by the litigants in this case is wasteful, unwarranted and a direct result of the acrimony between the parties and their lawyers." Id.

Rotella has been using a sledge hammer to kill a flea. While Gwynn has conducted herself unprofessionally, Rotella's response has been excessive, and at times unnecessary, thereby adding fuel to the hostility. Although a more proportional response would have been appropriate, the Court does not lose sight of the fact that Rotella had no choice but to respond to Gwynn' s reckless attacks on him personally.

Sanctions imposed pursuant to § 1927 "must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the `costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Peterson, 124 F.3d at 1396. Rotella shares some fault for the unreasonable multiplication of these proceedings as a consequence of his unmeasured, and at times unnecessary, response to Gwynn. Given Rotella's unmeasured response to Gwynn, it is impossible for the Court to determine which of the excessive line item amounts sought in Rotella's 138 page fee itemization are permissible as an award of sanctions. The excess proceedings that the court finds relevant to Rotella's

Motion for Sanctions were held on May 28, 2004, May 20, 2005, June 16, 2005,and February 16,2006. Various other matters were heard by the Court on those days,[22] such that it is difficult for the Court to determine the costs associated with the exact portion of the hearings that may properly be assessed as a sanction for the excess proceedings necessitated by Gwynn's unreasonable and vexatious conduct. However, had Rotella made a more measured response, the Court's best estimate for the reasonable amount of the excess costs, expenses, and attorney's fees incurred because of Gwynn having unreasonably and vexatiously multiplied the proceedings would be 40.0 hours at $350 per hour for a total award of $14,000.00 as explained below. The amounts sought by Rotella above and beyond $14,000.00 are grossly excessive and unwarranted.

In calculating an award of attorneys' fees the Eleventh Circuit explains that "the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate." Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 19837). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman, 836 F.2d at 1299 (citing 13lum v. Stenson, 465 U.S. 886, 895-96 (1984)). Based upon the Court's experience in reviewing numerous fee applications in bankruptcy proceedings, the Court finds that the hourly rate of $350.00 for Rotella's work is reasonable and in line with the hourly rates charged by attorneys of his skill and experience in the Southern District of Florida.

The Court estimates that a proportional response by Rotella to Gwynn would have required the following time:

10.0 hrs	Preparation for the initial May 28, 2004 hearing at which Gwynn, without notice to Rotella, withdrew Cole's Motion for Sanctions
1.0 hrs	Appearance by Rotella at May 28, 2004 hearing
4.5 hrs	Preparation of Rotella's Rule 901.1 Sanctions Motion (C.P. 266), which was subsequently filed as Rotella's Motion for Sanctions pursuant to 28 U.S.C. §1927 and 11 U.S.C. § 105 (C.P. 839)
6.0 hrs	Preparation for May 20, 2005 hearing
3.0 hrs	Appearance by Rotella at May 20, 2005 hearing
4.0 hrs	Preparation for June 16, 2006 hearing
6.0 hrs	Appearance by Rotella at June 16, 2005 hearing
2.0 hrs	Preparation for February 16, 2006 hearing
1.5 hrs	Appearance by Rotella at February 16, 2006 hearing
2.0 hrs	General administrative matters and communication with opposing counsel.
40.00 hrs	Total hours @ $350 = $14,000.00

The Court finds that an award in the amount of $14,000.00 is reasonable and appropriate pursuant to 28 U.S.C. § 1927 for the excess proceedings necessitated by Gwynn's unreasonable and vexatious conduct. The Court also finds that imposition of sanctions against

Gwynn in the amount of $14,000.00 is appropriate pursuant to 11 U.S.C. § 105 and the Court's inherent power "to manage its affairs which necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." Carlucci, 775 F.2d at 1447(citations omitted).

III. Gwynn's Sanction Motion and Gwynn's Transfer Motion

Gwynn's "Emergency" Sanction Motion [C.P.# 1393] filed on March 15, 2006 states that the nature of the emergency is that "Gary J. Rotella, Esquire, Debtor's counsel, by letters dated February 9, 2006, and March 8, 2006, has threatened or intends to file 'Motions for Sanctions', 'Referrals to the Florida Bar for Prohibition [from practicing before the) Bankruptcy Court for the Southern District of Florida' and 'Referrals to the Florida Bar' . . . " . [23] As a preliminary matter, emergency motions should be filed only for those matters where the requested relief requires immediate action to prevent harm. Gwynn has failed to explain how Rotella's intention to file a motion constitutes an emergency matter requiring immediate relief. Gwynn also filed an "Emergency" Transfer Motion, seeking transfer of Gwynn's Sanction Motion to District Court. The Transfer Motion similarly fails to meet the test for an emergency.

Having determined that neither "emergency" motion should have been filed on an emergency basis, the Court will attempt to address the substance of Gwynn's Sanction Motion. As a matter of law, the Court finds that Rotella's Rule 9011 safe harbor letters dated February 9, 2006 and March 8, 2006, are not grounds for

sanctions pursuant to section 1927. Although Gwynn states that the letters contain unwarranted threats and are intimidating, they are an insufficient basis for an award of sanctions. Gwynn further defends her having filed on March 2, 2006, a Supplemental Response to Rotella's Sworn Testimonial [24]("Supplemental Response") stating that it "cannot" be frivolous or vexatious and it does not warrant Rotella's Rule 9011 warning. The Court notes that Rotella's Sworn Declaration (Rotella's Exhibit "AA") was offered, but not accepted into evidence at the February 16, 2006 hearing. If Gwynn had participated in that hearing instead of leaving, or if she had carefully read the transcript of that hearing which she caused to be filed, she would have known that the Sworn Declaration is not part of the record. Nevertheless, Gwynn needlessly filed a Supplemental Response to Rotella's Sworn Declaration which the Court did not consider. The Court thus finds that none of Gwynn's assertions relating to Rotella's safe harbor letters warrant sanctions.

At this point Gwynn's Sanction Motion improperly raises issues that were previously determined and/or alleges impropriety in proceedings before other tribunals. Gwynn alleges that at Rotella' s 2004 Examination conducted nearly two years ago, Rotella perjured himself regarding his alleged pre-petition representation of the Debtor. Gwynn's Exhibit "1" was admitted into evidence at the April 17, 2006 hearing. Exhibit "1" is a letter dated February 23, 2006 by Barry G. Roderman, Esquire ("Roderman") to The Florida Bar referencing a complaint by Carl Shuhi. Roderman, under subpoena, appeared and testified at the April 17, 2006 hearing. He testified that his letter contained

errors and was incorrect insofar as it stated "my recollection is that Gary Rotella had represented James Walker sometime in the past prior to the time that I was initially retained in connection with a revocation of probation hearing in the early 90's". Roderman testified that he had no factual basis for having made that statement in his letter and it was in fact incorrect.

Gwynn also states that her allegations regarding Rotella's alleged perjury are explained in her Supplemental Response. Since the Court did not admit Rotella's Sworn Declaration, it will not consider Gwynn's Supplemental Response thereto. The Court notes however, that if Rotella's Sworn Declaration had been admitted at the February 16, 2006 hearing, Gwynn's Supplemental Response filed on March 2, 2006, would have been untimely filed. Nevertheless, it appears Gwynn's allegations regarding Rotella's alleged perjury is an impermissible attempt to renew Cole's Motion to Disqualify. Cole's Motion to Disqualify and Cole's Supplemental Memorandum in Support of Cole's Motion to Disqualify [C.P.311] resulted in the Court imposing sanctions against Gwynn. Although the District Court Order vacated the Court's Order Awarding 9011 Sanctions, the Court reaffirms its findings of fact. Specifically, Cole had no standing to raise the issues in the Motion to Disqualify or in the Supplemental Memorandum thereto. The Court also reaffirms its finding that Gwynn had no legal basis upon which to file Cole's Motion to Disqualify, or Cole's Supplemental Memorandum in Support of Cole's Motion to Disqualify. Order Awarding Sanctions (June 15, 2004) Par. 4.

Gwynn also alleges in Gwynn's Sanction Motion that

Rotella lied regarding settlement discussions, an allegation which she indicates is more fully explained in her Supplemental Response. Any settlement discussions the parties might have engaged in are irrelevant to the issues before the Court. In addition as discussed above, the Court does not consider Gwynn's untimely and unnecessary Supplemental Response as a basis upon which to award sanctions.

Gwynn alleges in Gwynn's Sanction Motion that Rotella lied to the Eleventh Circuit concerning Jay Farrow's April 19,2005 letter of resignation from Rotella P.A. Gwynn alleges that Farrow's appearances before this Court, the District Court, and the Eleventh Circuit subsequent to his resignation from Rotella P.A., are evidence that Rotella lied to the Eleventh Circuit during oral argument in that tribunal. The Court does not agree that a former associate's appearance in court on behalf of his former employer evidences that the employer lied about the status of the associate's employment. Nevertheless, Gwynn's allegation that Rotella lied to the Eleventh Circuit is a matter for the Eleventh Circuit.

Gwynn alleges in Gwynn's Sanction Motion that Rotella made intentional misrepresentations to the District Court by representing that this Court had ruled on Gwynn's Response to Debtor's Renewed Motion to Reopen Evidence Pursuant to Bankruptcy Rule 9023 and Fed. R. Civ. P. 59(a) and the Undersigned Request for a Hearing on the Undersigned's Motion for Sanctions Against Gary J. Rotella, Esq. [C.P. 244]. Gwynn's allegation that Rotella made misrepresentations to the District Court is a matter for the District Court. However, to the extent that Gwynn

maintains she is entitled to sanctions against Rotella based upon the Court's April 12,2004, order Reserving Ruling on Mary Alice Gwynn's Request for Sanctions and Attorney's Fees against Gary H. Rotella, Esq. [C.P.275], the Court declines to exercise that reservation of jurisdiction to award sanctions to Gwynn.

Gwynn alleged in Gwynn's Sanction Motion that "Rotella, with the assistance of his associate, Jay Farrow, had an underlying agenda to sabotage and remove the Creditor-elected Trustee [Linda Walden], as she was on the verge of filing an adversary action to disclose all of the Debtor's additional assets." Gwynn's Sanction Motion Par. 33. This Court's removal for cause of Linda Walden as trustee has been affirmed by the District Court and is now under appeal to the Eleventh Circuit. Gwynn may not relitigate Linda Walden's removal as trustee in Gwynn's Sanction Motion.

It is astonishing to the Court that given the Court's April 8, 2005, order Granting Debtor's Emergency Motion to Strike Gwynn' s Motion to Clarify the Record for Fraud upon the Court; Motion to Preclude and Prohibit Mary Alice Gwynn, Esquire from Filing Pleadings on Behalf of Parties Represented by Other Counsel; and Denying Motion for Immediate Referral to the Florida Bar Without Prejudice With Reservation of Jurisdiction (the "April 8, 2005 order")(emphasis added) [C.P. 800], that Gwynn's prayer for relief at paragraph D requests sanctions for the damages Rotella "caused to the Creditor's Counsel, Creditor-elected Trustee, Walden, and all the other parties to this matter." The Court's April 8, 2005 Order found that Gwynn had no standing to file her Motion to Clarify the

Record and supplement thereto, since she did not represent the parties on behalf of whom she filed the motion. Gwynn was ordered not to file any further pleadings on behalf of parties that she did not represent. Nevertheless in violation of the Court's April 8, 2005 order, Gwynn has now filed Gwynn' s Motion for Sanctions seeking relief for damages caused to the creditors, creditors' counsel, and former trustee Linda Walden, none of whom she currently represents. For the reasons stated above, the Court denies Gwynn's Sanction Motion finding that it is wholly without merit.

As to Gwynn's Transfer Motion, the Court notes that Gwynn has demonstrated a pattern of bringing matters before the wrong court. As detailed above, Gwynn failed to raise her concerns about proceedings in State Court before the State Court. Instead, she raised her concerns about the State Court proceedings with this Court ten months later in Cole's Motion for Sanctions. Gwynn recently brought substantially similar motions before two different courts simultaneously. On March 16, 2006, Gwynn filed a motion to withdraw the reference in this Court. On the same day she filed a similar motion in District Court. The District Court's order denying her motion to withdraw the reference noted her failure to follow local procedural rules by filing her motion in the District Court.[25] Gwynn' s motion to withdraw the reference which was filed with this Court has been transmitted to the District Court. It seeks the same relief as Gwynn' s Transfer Motion. Therefore, the Court will deny as moot Gwynn's Transfer Motion.

IV. Gwynn's Conduct Before This Court Warrants

Referral to The Florida Bar

Gwynn's conduct before this Court has been unprofessional. Her pleadings are confused and often difficult to understand. She files pleadings in the wrong court and has filed the same motion in different courts at the same time. As recently as the hearing on Gwynn's Sanction Motion held April 17, 2006, Gwynn improperly attempted to relitigate matters that have already been determined. She has made scurrilous allegations that lack any basis in fact or in law without having conducted any investigation. She has also made allegations that demonstrate her failure to examine or understand the Local Rules, or the Federal Rules of Bankruptcy Procedure. Gwynn's testimony at the Sanctions Hearing was at times disjointed, confusing, unresponsive, and incoherent. She has provided no credible testimony or evidence to support most of her allegations. She has admitted conducting research on the substance of her allegations after having filed her pleading. Her allegations between pleadings were inconsistent and contradictory. Lately every motion Gwynn files in this case has been designated as an "Emergency Motion," when there exist no exigent circumstances requiring immediate relief. Gwynn has routinely made accusations and allegations for which there was no evidentiary support, she has walked out of hearings, and she has repeatedly demonstrated her lack of understanding of the law. The Court concludes that Gwynn has engaged in unprofessional conduct before this Court.

The Code of Conduct for United States Judges, Canon 3(B)(3) states that, "A judge should initiate appropriate action when the judge becomes aware of reliable

evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." The commentary to Canon 3(B)(3) states that, "Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authorities." Therefore, the Court is providing a copy of this Order to the Florida Bar for investigation of Gwynn's unprofessional conduct as an attorney before this Court throughout this proceeding.

V. The Over-Litigation of This Case

The Court finds that both Gwynn and Rotella share responsibility for unnecessarily turning this seemingly straight forward chapter 7 case into a case of massive proportions. Gwynn and Rotella share fault for this case having taken an absurd and wasteful course. The Court finds that Rotella has used poor judgment as evidenced by his unmeasured response to Gwynn. Both Gwynn and Rotella have improperly over-litigated this case and in so doing they have demonstrated their complete disregard for this Court's time and resources. There remain no core issues to determine in this case. The only pending matters in this case are sanctions cross-motions between the various parties. This case should have been concluded long ago.

CONCLUSION

For the reasons stated above, the Court grants Rotella's Motions for Sanctions but denies both Rotella's Second Amended Discovery Sanctions Motion and Gwynn's Sanction Motion.

ORDER

Having carefully reviewed the applicable law, the District Court Order, the Second Amended Discovery Sanctions Motion, Rotella's Motion for Sanctions, Gwynn's Sanction Motion, Gwynn's Transfer Motion, the conduct of Rotella and Gwynn during this proceeding and being otherwise fully advised in the premises, the Court hereby ORDERS AND ADJUDGES:

1. The Second Amended Discovery Sanctions Motion is DENIED.
2. The Amended Order designated as Court Paper No. 1217 is VACATED.
3. Rotella's Motion for Sanctions is GRANTED. Gwynn shall pay Rotella fourteen thousand dollars ($14,000.00) as sanctions.
4. Gwynn's Sanction Motion is DENIED.
5. Gwynn's Transfer Motion is DENIED AS MOOT.

Footnotes

[1]The Court received and admitted into evidence Gary J. Rotella, P.A. and Rotella Is, Exhibits "All through "T" at the February 16, 2006 hearing. Exhibit "AA" was not admitted into evidence.

[2]In addition to striking Cole's claim and entering Final Default Judgment against Cole for $57,478.25, the Cole Default Order entered Final Default Judgment against Cole for $80,572.50, the amount sought in Rotella's Rule 9011 Sanctions Motion [C.P.360] and for $99,402.50, the amount sought in Rotella's Motion for Sanctions [C.P.463].

[3]The Eleventh Circuit has ruled that, "A motion for sanctions under Rule 37, even one which names only a party, places both that party and its attorney on notice that the court may assess sanctions against either or both unless they provide the court with a substantial justification for their conduct" Devaney v. Continental American Ins. Co., 989 F.2d 1154, 1160 (11th Cir. 1993); Stuart I. Levin & Assoc. PA, v. Rogers, 156 F.3d 1135, 1142 (11th Cir. 1998). Notwithstanding these precedents, the Court acquiesced to Gwynn's claim that she believed the Amended Discovery Sanctions Motion was brought solely against Cole.

[4]Exhibit "M" subsection "C", admitted into evidence at the February 16, 2006 hearing, was also admitted as Rotella's Exhibit "H" at the Sanctions Hearing.

[5]At the conclusion of the June 15, 2005 hearing, the Court stated that if it granted the Motion for Sanctions, it would conduct a separate hearing on the amount.

[6]The hearing on Rotella's Motion for Sanctions and on the Second Amended Discovery Sanctions Motion had been set for 9:30 A.M., January 27, 2006. On January 26, 2006 at 3:10 P.M., Gwynn filed an Emergency Motion to Continue Hearing. The Court granted her motion and continued the hearing until February 16, 2006, a date that was acceptable to Gwynn.

[7]Bankruptcy Rule 9011 is inapplicable to discovery disclosures and requests. See B.R. 9011 (d). 28 U.S.C. §1927 in also inappropriate here because it only permits sanctions against attorneys, not parties. See e.g., Byrne v. Nezhat, 261 F.3d 1075, 1106 (11th Cir. 2001). Cole's culpability in this matter has already been determined. See Cole Default Order.

[8]"Invocation of the Court's inherent powers requires a finding of bad faith" In re Mroz, 32 F.3d at 1575 (citing Chambers, 501.U.S. at 49). There has been no evidence

presented that Gwynn acted in bad faith with respect to the discovery matters at issue.

[9]The Amended Order used a less stringent objective standard which would have been acceptable in some circuits. See e.g. Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir.1984); In re Ruben, 825 F.2d 977 (6th Cir.1987); Jones v. Continental Corp., 789 F. 2d 1225 (6th Cir.1986); Lewis v. Brown & Root, Inc., 711 F. 2d 1287 (5th Cir.1983); see also Cruz v. Savage, 896 F. 2d 626, 631-32 (1st Cir.1990) ("Behavior is 'vexatious' when it is harassing or annoying, regardless of whether it is intended to be so....It is enough that an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a 'serious and studied disregard for the orderly process of justice.'").

[10]In Hardy, a chapter 13 debtor sought sanctions based upon the Internal Revenue Service's willful, rather than bad faith violation of the discharge injunction. Id.

[11]The Courtesy Inns line of cases dealt with the issue of whether or not bankruptcy courts are "courts of the United States" capable of exercising the inherent and statutory powers reserved to Article III courts. Courtesy Inns determined that bankruptcy courts are not "courts of the United States" and therefore do not have authority to impose section 1927 sanctions. Volpert, 110 F.3d at 501. Rainbow Magazine determined that section 105 imbues bankruptcy courts with powers similar to an Article III court's inherent powers. Id. Volpert sidestepped the issue by finding that 11 U.S.C. § 105 provided an alternative basis to 28 U.S.C. § 1927 for awarding sanctions for bad faith filings. Id.

This Court agrees with the cases that find that bankruptcy courts are "units" of the district court and have jurisdiction to award sanctions under 28 U.S.G. §

1927 "due to [their] jurisdictional relationship with the district court". In re Lawrence, 2000 WL 33950028 *4 (Bankr. S.D. Fla. 2000) accord Huff v. Brooks (In re Brooks), 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994) ; see also Grewe v. United States (I'n re Grewe), 4 F.3d 299 (4th Cir. 1996) (concluding Congress intended bankruptcy courts to qualify as courts of the United States).

[12]The Receivership Proceeding is the case styled Eleanor C. Cole v. James F. Walker, In The Circuit Court of The 17th Judicial Circuit, In And For Broward County, Florida, Case Number 89-21462 (09).

[13]The Court's Order Denying Motion For All Remedies at paragraph 2 found that: [t]he existence of the Guarantee was disclosed to the office of the United States Trustee on August 14, 2003. However Rotella did not file the Notice of Filing [Amended Disclosure of Compensation and Second Amended Disclosure of Compensation] which referenced the Guarantee, with the Court until May 28, 2004. while the Notice of Filing Disclosures of Compensation was not filed with the Court until May 28, 2004, the parties in interest had notice of the existence of the Guarantee as early as September of 2003."

[14]Rule 9013-1(C) of the Local Rules of the United States Bankruptcy Court for the Southern District of Florida allows a variety of motions to be considered without a hearing ("ex parte motions). Subsection (2) of Rule 9013-1(C) provides

> Motions to extend the time for filing schedules, statements, or lists, where the requested extended deadline is not later than 5 days before the § 341 meeting or post-conversion meeting. The motion must be served on the debtor, the

trustee, the U.S. trustee, and all parties who have requested notices. . .

[15]Gwynn made substantially similar allegations in Paragraph 9 of Cole's Supplemental Motion for Sanctions.

[16]A restitution hearing was held on July 3, 2003 in the matter styled State of Florida v. James F. Walker, In the Seventeenth Judicial Circuit, In and For Broward County, Florida, Case Number: 90-20599 CF10A.

[17]Bankruptcy Rule 9011 is substantially similar to Fed. R. Civ. P. 11 and the case law interpreting Fed.R.Civ.P. 11 is often used in applying Rule 9011. See, e.g., 1n re Mroz, 65 F.3d at 1572.

[18]Ridder further states, "Undoubtedly, the drafters also anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other with an eye toward potentially resolving their differences prior to court involvement." Ridder, 109 F.3d at 294. Unfortunately, the drafters, anticipation has not been realized in this case.

[19]Rotella's original Rule 9011 Sanctions Motion sought sanctions pursuant to both Rule 9011 and 11 U.S.C. §105.

[20]In the District Court order vacating the Court's Order Awarding Rule 9011 Sanctions, Judge Gold stated that had he considered the issue he would have concluded that the award of $80,572.50 was as an abuse of discretion.

[21]As reported by Chapter 7 Trustee Patricia Dzikowski on the December 31, 2005, Individual Estate Property Record and Report filed with the United States Trustee.

22 The following matters were noticed for hearing on

the respective hearing
dates:
May 28, A2004
1) Renewed Motion to Disqualify Rotella PA from Representing Debtor(C.P. 361); 2)Cole's Motion for Sanctions Against Rotella Pursuant to Court's Order Entered on 7/17/03 (C.P. 266); 3)Debtor's Motion for Attorneys' Fee and Costs Against Eleanor Cole (C.P. 255); 4)Cole's Supplement to Motion for Sanctions Against Rotella Pursuant to Court's Order Entered on 7/17/03 (C.P. 273); 5) order Reserving Ruling on Gwynn's Request for Sanctions and Attorneys' Fees Against Rotella (C.P. 275) ; 6) Cole's Motion for Protective Order (C.P. 237); 7)Debtor's Motion for Finding of Contempt and for Entry of Sanctions Against Gwynn (C.P.195); 8) Debtor's Motion for Sanctions Against Gwynn and Cole Pursuant to Rule 9011 (C.P. 360);9) Debtor's Motion for Relief from order and to Conform Order to Court's Ruling (C.P. 72); and 10)Motion for Protective Order (C.P. 371).
May 20, 2005
1) Cole's Motion for Rehearing (C.P. 864); 2) Creditor Shuhi Motion for Rehearing Court Order Dated 4/19/05 (C.P. 863); 3)Debtor's Amended Motion for Attorneys' Fees and Costs Against Cole (C.P. 838); 4) Gwynn's Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Strike Gwynn's Motion to Clarify Record for Fraud Upon the Court...(C.P.825); 5)Gwynn's Motion to Strike and /or Vacate Order Granting Debtor's Emergency Motion to Preclude Gwynn from ReRepresenting Shuhi and Florida Precision Calipers, Inc. . . (C. P. 827); 6)Rotella's Motion for Sanctions (C.P. 839); 7) Cole's Motion for Rehearing (C.P. 856); and 8)Motion to Quash filed by Carol Ann Walker (C.P. 894).

June 16,2005 (Continuation of all matters from May 20, 2005)

1) Cole' s Motion f or Rehearing (C.P. 864); 2) Creditor Shuhi Motion for Rehearing Court Order Dated 4/19/05 (C.P. 863); 3)Debtor's Amended Motion for Attorneys' Fees and Costs against Cole (C.P. 838); 4) Gwynn' s Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Strike Gwynn's Motion to Clarify Record for Fraud Upon the Court ...(C.P.825); 5)Gwynn's Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Preclude Gwynn from ReRepresenting Shuhi and Florida Precision Calipers, Inc ...(C.P. 827); 6)Rotella's Motion for Sanctions (C.P.839); 7) Cole's Motion for Rehearing (C.P.856); 8}Motion to Quash filed by Carol Ann Walker (C.P. 894): 9) Gwynn's Motion to Extend Time to File Designation of Items (C.P. 923); 10)Gwynn's Motion to Consolidate Appeals (C.P. 922); 11)Motion to Set Aside Court's Order Removing Chapter 7 Trustee (C.P. 943); 12)Lundborg's Motion to Continue (C.P.944); and 13)Emergency Motion By Francis L Carter, Gary M Murphree To Quash Subpoenas Served by Gwynn, Upon Francis L. Carter, Esq. and Gary M. Murphree, Esq (C.P. 892).

[23]On February 27, 2046, Rotella filed a Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to Bankruptcy Rule 9011, 28 U.S.C. 91927 and 11 U.S.C. §105 and Referral to the Florida Bar for Prohibition from Practicing Before the United States Bankruptcy Court of Florida and for Referral to the Florida Bar, (C.P.1358) which the Court denied in an order dated March 10, 2006.

[24]Gwynn's Supplemental Response to Rotella's Sworn Testimonial [C.P.1369] references her original Response [C.P. 1326] which in turn references the

"Sworn Testimonial of Gary J. Rotella, Esquire and the Sworn Declaration of Gary J. Rotella." Rotella filed a Sworn Testimonial [C.P. 1282] on January 25, 2006 and a Notice of Filing a Sworn Declaration [C.P. 1311] on February 8, 2006.Although unclear, it is immaterial whether Gwynn's Supplemental Response responds to Rotella's Sworn Declaration or Rotella's Sworn Testimonial because neither document was considered by the Court.

[25]The District Court also stated that Gwynn's motion was unclear. It further noted that "[a]ccording to the caption of the Instant Motion, [Gwynn] seeks relief pursuant to 28 U.S.C.§ 157(d) and Rule 87.3 of the Federal Rules of Civil Procedure. There is no such Federal Rule of Civil Procedure." The District Court inferred that Gwynn intended to seek relief pursuant to Rule 87.3 of the Local Rules of the United Stated District Court for the Southern District of Florida.

No. 07-14049 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: JAMES F. WALKER, Debtor.
MARY ALICE GWYNN, Plaintiff-Appellant Cross-Appellee,
versus
JAMES F. WALKER, Defendant-Appellee Cross-Appellant.

August 28, 2008, Filed

Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 07-80121-CV-ASG. BKCY No. 03-32158-BKC-PGH.

JUDGES: Before DUBINA, BLACK and PRYOR, Circuit Judges.

PER CURIAM :

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bans (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Bane are DENIED.